91-1853

Supreme Court, U.S.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 1991

JOHN D. O'BRIEN,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

Petition For Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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92-510

QUESTIONS PRESENTED

1. WHETHER A COMPLETELY ENCLOSED COMMERCIAL BUILDING, NOT REASONABLY SUSCEPTIBLE TO VIEW, AERIAL OR OTHERWISE, IS SOMEHOW STRIPPED OF ALL MANIFEST, REASONABLE PRIVACY EXPECTATIONS, SIMPLY BECAUSE IT IS CONSTRUCTED IN WHAT MIGHT OTHERWISE HAVE BEEN A MERE "OPEN FIELD." STATED ANOTHER WAY, THIS CASE PRESENTS FACTS BOTH UNIQUELY DISTINGUISHABLE FROM, AS WELL AS CROSS-BRED WITH THOSE CONFRONTED BY THIS HONORABLE COURT IN THE *DUNN-DOW CHEMICAL* DECISIONS,[1] PROVIDING THE OCCASION TO DECIDE ISSUES THERE LEFT OPEN AND UNANSWERED: TO WHAT EXTENT AND UNDER WHAT CIRCUMSTANCES WILL THE FOURTH AMENDMENT AFFORD PROTECTION TO COMMERCIAL BUILDINGS? IS THERE NO WAY TO MANIFEST REASONABLE EXPECTATIONS OF PRIVACY IN A CLOSED AND LOCKED COMMERCIAL BUILDING THAT JUST HAPPENS TO BE CONSTRUCTED IN AN OPEN FIELD? IS THE PHRASE "OPEN FIELD" A TALISMAN IN WHOSE PRESENCE ALL REASONABLE EXPECTATIONS OF PRIVACY FADE AWAY?

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1 *United States v. Dunn*, 476 U.S. 227, 106 S.Ct. 1819, 90 L.Ed.2d 226 (1986) and *Dow Chemical Co. v. United States*, 480 U.S. 294, 107 S.Ct. 1194, 94 L.Ed.2d 326 (1987).

2. WHETHER A SENTENCING JUDGE HAS THE POWER AND PREROGATIVE TO GRANT A § 5K2.0 DOWNWARD DEPARTURE BASED UPON SUCH REMARKABLE ALLOCUTION, REMORSE AND ACCEPTANCE OF RESPONSIBILITY, AS WELL AS VOLUNTARY *POST-OFFENSE* SELF-REHABILITATION AND "COMMUNITY RESTITUTION" THAT IS NOT ONLY OF AN EXTRAORDINARY KIND AND TO A DEGREE THAT IS RARELY ENCOUNTERED IN SUCH CASES, BUT ALSO THAT OVERWHELMINGLY DEMONSTRATES A RARE AND EXTREMELY POSITIVE LIKELIHOOD OF SUCCESSFUL REHABILITATION.

LIST OF ALL PARTIES[2]

1. John D. O'Brien

2. Charles D. Pace

3. John Kountz Treanor

4. United States of America

2Pace and Treanor were Co-Defendants and Co-Appellants respectively in the courts below. Though perhaps not framing the Fourth Amendment issue as Petitioner O'Brien has, Treanor filed a related Petition for Writ of Certiorari before this Court. Only Petitioner O'Brien brings forward a sentencing departure issue.

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NO. _____

IN THE

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JOHN D. O'BRIEN,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

Petition For Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

The Petitioner, John D. O'Brien, praying that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit issued on December 30, 1991, files this his Petitioner for Writ of Certiorari, saying more particularly in support thereof as follows:

OPINIONS AND JUDGMENTS ISSUED IN THE COURTS BELOW

Petitioner O'Brien moved to suppress all evidence gained, directly and derivatively, by the United States of America ("The Government") from what he contended to be unreasonable governmental spying into a rural barn that, without dispute from anyone in this record, was affirmatively found to be a locked, commercial building that was

reasonably closed off from view. The District Court denied the motion, issuing original and supplemental findings and conclusions, both of which are respectively set out at Appendices A and B.

After entering a conditional plea of guilty, Petitioner O'Brien pursued his fight for the Fourth Amendment issue in the United States Court of Appeals for the Fifth Circuit. The Government cross-appealed, arguing that the District Court was without authority to grant a 5K2.0 downward departure from the otherwise applicable sentencing guideline range.

Erroneously viewing our facts as being indistinguishable from those in *Dunn, supra*, and thus controlled by that case, the Fifth Circuit affirmed the District Court on the unreasonable search issue and next, without even alluding to the District Court's detailed written findings and conclusions as to the reasons for departure, misperceived those reasons and remanded for resentencing. The District Court's detailed findings and conclusions in support of his reasons for the downward §5K2.0 departure are set out at Appendix C. The Opinion handed down by the Fifth Circuit in Petitioner's appeal to that Court is cited at 950 F.2d 969 (5th Cir. 1991) and is set out at Appendix D[3]

Petitioner timely and properly filed a Motion for Panel Rehearing. The same was in all things denied, as is evidenced by the Order from the Fifth Circuit set out at Appendix F.

3The related Opinions for Co-Appellants Pace and Treanor are cited at 955 F.2d 270 (5th Cir. 1992) and 950 F.2d 972 (5th Cir. 1991), respectively. In disposing of Petitioner O'Brien's appeal of the unreasonable search issue, the Fifth Circuit pointed to its companion Opinion in *Pace*, wherein the bulk of that issue was discussed. Accordingly, the Fifth Circuit's Opinion in *Pace, supra*, is set out at Appendix E.

JURISDICTION

Petitioner was charged by indictment with conspiracy to possess marijuana plants and with the substantive offense of possessing them with intent to distribute. Jurisdiction was thus conferred upon the District Court by virtue of 18 U.S.C., §3231. Preserving the unreasonable search issue for appeal by his conditional plea, Petitioner was adjudged guilty and, on September 21, 1991, sentenced to a term of imprisonment. A true and correct copy of that judgment is set out at Appendix G.

Petitioner then timely and properly filed his written Notice of Appeal to the Fifth Circuit, a true and correct copy of which is set out as Appendix H. As to Petitioner's direct appeal of the unreasonable search issue, jurisdiction was properly conferred upon the Fifth Circuit by virtue of Rule 11(2), Fed. R. Crim. P., and 28 U.S.C., §1291. As far as the cross-appeal taken by the United States of America on the sentencing issue, jurisdiction was proper before the Fifth Circuit under 18 U.S.C., §3742(d). After remand on the sentencing issue, the District Court granted a Stay of Resentencing until such time as Petitioner could bring forward this writ. *See* Appendix I.

Jurisdiction is proper before this Honorable Court by virtue of 28 U.S.C., §1254(1).

CONSTITUTIONAL, STATUTORY, AND FEDERAL SENTENCING GUIDELINES PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution says:

> "The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly

describing the place to be searched, and the persons or things to be seized."

18 U.S.C., §3553(b) says:

> "**(b) Application of guidelines in imposing a sentence.** --The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission."

Sec. 5K2.0, Federal Sentencing Guidelines Manual, states, in pertinent part:

§5K2.0. **Grounds for Departure (Policy Statement)**

"Under 18 U.S.C. §3553(b) the sentencing court may impose a sentence outside the range established by the applicable guideline, if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." Circumstances that may warrant departure from the guidelines pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance. The controlling decision as to whether and to what extent departure is warranted can only be made by the courts."

STATEMENT OF THE CASE

INTRODUCTION

At the outset, Petitioner emphasizes that, contrary to the Fifth Circuit's assessment, the *undisputed* facts of this case are ultimately a far cry from those presented to this Court in *Dunn, supra*. Petitioner implores this Honorable Court to take the facts in *Dunn* as a backdrop against which Petitioner's Fourth Amendment protection should be measured and gauged in light of the undisputed statement of facts in this case. The distinctions will thus become remarkable and, more significantly, of consequence to a reasonable, practical and freedom-minded interpretation of the Fourth Amendment as it applies to this case.

A. THE WARRANTLESS, GOVERNMENTAL

SPYING: ROUND ONE IN THE AIR

In October 1988, and again in May 1989, law enforcement agents in Travis County, Texas, received generalized information that marijuana plants were being grown on a forty-three (43) acre tract of land within that county. Acting initially upon that information, law enforcement agents engaged a helicopter for extensive, aerial surveillance of the suspect property. By so doing, agents learned nothing more, nor suspected anything else, other than the physical layout which included a secure, outer parameter fence, a house, a nearby shed, a garage, and several interior fences, as well as a barn (and fence surrounding it) that the District Court expressly and affirmatively found to be a commercial building.[4]

In addition to expressly having been found to be a commercial building, this barn had, again without dispute from either the Government or the Fifth Circuit, a feature in stark contrast to the barn considered in *Dunn, supra. The barn here was not reasonably open to view.* Indeed, there were no windows and entrance could only be made through two locked doors which, at all times material to this investigation, remained locked. So, nothing having been exposed to aerial view, agents took to the ground.

B. REASONABLY OPEN TO VIEW *VERSUS* REASONABLY CLOSED TO VIEW: ROUND

4In its initial findings of fact, the District Court wrote: "*...The barn was a commercial structure used in the business of farming or ranching.*" That finding, without any dispute from the Government or the Fifth Circuit, was re-emphasized by a subsequent Order entered by the District Court on a Motion for Reconsideration made by Co-Defendant Treanor. There, the District Court pointed out that it had already found the barn to be a commercial structure, but clearly laid the matter to rest by pinpointedly finding "*...The Court now finds based upon the evidence adduced in the record that the barn is in fact a commercial structure....*" *See* Order on Motion for Reconsideration at Appendix B.

TWO ON THE GROUND

Back on the ground, one agent "squeezed" himself through the gap between the fence and the entrance gate and the other hopped over it, both ignoring the prominent "Beware of Dog" sign.[5] Next, the agents hopped over at least two more interior gates, one of which surrounded the barn. *See* diagram admitted into evidence and set out at Appendix J.

Agents could not see inside the barn, even once inside the fence that surrounded it.[6] It is undisputed that agents neither saw, nor smelled anything suspicious from a distance even reasonably close to the barn. The undisputed and accepted facts of the matter are that agents had to hunt around the exterior walls of the barn for some time, find a small crack in the corrugated tin siding and, even then, press their faces and eyeballs up against the siding to even begin to see inside. Having exhausted those unreasonable measures as a last resort, agents were able to see marijuana plants growing inside.

Officers made subsequent, similar warrantless entries upon this property and, based upon information thusly gained, obtained search warrants for various other residences, all of which were contended to be "fruit of the

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5The District Court, again without dispute from the Government or the Fifth Circuit, found "it is accepted by the general public and residents in this geographical area that a fence and a locked gate are reasonable indications that no one should enter that property without permission. Anyone who crosses such a fence or locked gate without authorization is generally considered a trespasser." *See* Findings of Fact and Conclusions of Law at Appendix A.

6This presents a significant factual distinction from *Dunn*. In *Dunn*, the officers, standing outside of the wooden fence that surrounded the barn, were able, with the aid of a flashlight, to see into the front of the barn that was wide open but for a skimpy netting that extended from the barn roof to the fence.

poisonous tree" and made the basis of various inclusive motions to suppress.

REASONS FOR ALLOWANCE OF THE WRIT

1. To clear the air of confusion that exists among the bench and the bar as to whether and under what circumstances a commercial building is afforded Fourth Amendment protection as a result of manifest, reasonable expectations of privacy that surround it.

2. This case also presents issues that were left for another day between this Court's decisions in *Dunn* and *Dow Chemical*. Does a commercial building that is *neither open to aerial view, nor reasonably open to view from the ground*, lose its manifest privacy expectations simply because it may not be within home curtilage or because it may lie within what was once an "open field"?

3. Because the Fifth Circuit erroneously perceived the facts of this case and those in *Dunn* as being indistinguishable, its decision is in conflict with *Dunn*, especially as amplified by this Court's prior acknowledgment in *Oliver, infra*, and *Dow Chemical, supra*, that commercial buildings and Fourth Amendment protections are not strangers to one another.

4. The Fifth Circuit's decision that the Federal Sentencing Guidelines prohibit a 5K2.0 downward departure based upon even an *extraordinary* demonstration of remorse, self-rehabilitation, and voluntary, post-offense "community restitution" that is *rarely* encountered in kind and degree, not only conflicts with a plain reading of the Guidelines and punishment objectives stated therein, but also directly conflicts with decisions in other United States Courts of Appeals, not the least of which are *United States v. Maddalena*, 893 F.2d 815 (6th Cir. 1989), *cert. denied*, ____U.S. ___, 112 S.Ct. 233 (1991); *United States v. Harrington*, 947 F.2d 956 (D.C. Cir. 1991); *United States*

v. Lopez, 938 F.2d 1293 (D.C. Cir. 1991); and *United States v. Sklar*, 920 F.2d 107 (1st Cir. 1990).

The Sentencing Guidelines do not frown upon disparate sentences *per se*. They frown upon *unfair* disparity. However, when that rare and unusual case of mitigating circumstances comes along, a downward departure works no offensive disparity because the difference is *fair* in light of the peculiarities of the circumstances. It is indeed an anomalous case where, as here, a *fair* application of the Sentencing Guidelines nonetheless results in unfair, quirky disparity -- not because of the guidelines, but because a particular sentence was reviewed by the Fifth Circuit, instead of the First, Sixth or District of Columbia Circuits.

ARGUMENT

A. NOTWITHSTANDING ITS "NON-HOME CURTILAGE" OR "OPEN FIELD" LOCATION, A COMMERCIAL BUILDING IS ENTITLED TO WHATEVER MODICUM OF PRIVACY THAT ITS DESIGN AND PRACTICAL OPERATION AFFORD.

Commercial buildings are not devoid of Fourth Amendment protection. This general proposition has not only been highlighted by the Supreme Court but, for purposes of argument, assumed on occasion. *Oliver v. United States*, 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984); *Dow Chemical, Dunn, supra*. Can it reasonably be that a commercial building that is located on the public streets of a thriving metropolis, where hundreds of people pass by daily, may well be entitled to Fourth Amendment protection, but a commercial building, placed in a rural setting, where people are not only *unexpected*, but are affirmatively put on notice that entry is forbidden, is not? Has what was once a plain, simple, and logical "open field" exception to the warrant requirement been transformed and tortured into the unlimited "Open Sesame" powers of Ali-

Baba? In the eyes of such sacred constitutional guarantees as the Fourth Amendment, does unreasonably peeped *versus* actual physical entry or destruction afford any meaningful distinction for the reasonably freedom minded?

The issue here does not call for Petitioner to quibble with *Dunn's* four-fold criteria for determining what constitutes a house curtilage. Although the realities of rural life presented the occasion for it[7], Petitioner's point before the Fifth Circuit was *not* that the locked, closed-off commercial structure of the barn was within the curtilage of the house. Rather, Petitioner argued there, and argues here, that (a) had *Dunn*'s barn been affirmatively found to have been a commercial building used for commercial purposes, and (b) had *Dunn*'s barn been constructed, maintained, and operated the same as the one here under consideration, (i.e., *not* reasonably open to view), then the result in *Dunn* would have been different. This is especially true, given the aforesaid repeated recognition by the Supreme Court that commercial buildings, just like even automobiles driving upon public highways, are entitled Fourth Amendment protection. Neither the word "barn," nor the phrase "open field" are talismans in whose presence the Fourth Amendment fades away.

To illustrate his point, Petitioner has set out a simple diagram at Appendix K. This diagram demonstrates the reasonable *versus* the unreasonable. In the diagram, Commercial Building A, similar to the barn in *Dunn*, has its front doors open. The inside of the barn is thus reasonably open to view. In such cases, where the doors, windows,

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7In the "real world" of rural life, a barn is used for activities intimately associated with home life, just as much and to the same degree as a typical garage might be in the suburbs of the city. Justice Brennan, with whom Justice Marshall joined in his dissent, has already convincingly noticed that unremarkable truism. *Dunn, supra*, 107 S.Ct. at 1143.

over-head coverings, or other conventional openings are left open such that the inside is reasonably exposed to view, then reasonable expectations of privacy are not sufficiently manifest and Fourth Amendment protections will shrink proportionately. The barn in this case, however, is like Commercial Building B in the diagram. Its only two doors were locked. No conventional access openings were reasonably exposed. Because of this critical distinction -- that is, the demonstrated manifestation of Petitioner's reasonable expectations of privacy, the agents were not simply standing in an "open field" when they viewed the contents of the barn, as the Fifth Circuit is content to say. To the contrary, they were standing in the middle of a recognized and reasonably, if not patently, manifest zone of privacy at the time that they pressed their faces and eyeballs up to the small crack in an exterior wall of the barn.

Manifestations of reasonable expectations of privacy that render a commercial building *not* reasonably open to view, *from the ground or the air*, accomplish the functional equivalent of a "business curtilage" (i.e., a recognizable and protectable zone of privacy, trespasses against which fall on the unreasonable side of the Fourth Amendment's imaginary boundary line) of objective reasonableness.

Dunn did not consciously invite the agents to do what they did here. A conscious explanation from this Court, however, would make it clear that such invitation was never intended.

B. THE LESS THAN ROBOTIC SENTENCING DEPARTURE

Petitioner's sentencing guideline range was calculated to be between 33 and 41 months. The District Court departed downward, however, assessing Petitioner's term of incarceration at 12 months. In open court, the sentencing

judge categorically stated his reasons for departure[8] and then amplified upon those reasons by carefully detailed findings. *See* Appendix C.

The Fifth Circuit miscategorizes and oversimplifies the District Court's studied and careful reasoning. Specifically, the Fifth Circuit erroneously took the basis for the departure as being an impermissible "community ties" or "something good about the Defendant" position. *O'Brien*, 950 F.2d at 971. Not so, and nothing could be further from the case.

The District Court commendably acknowledged, in great detail, that Petitioner presented him with one of those rare and extraordinary cases where the mitigating circumstances were to a kind and to a degree not ordinarily presented and thus, not adequately taken into consideration by the guidelines. Specifically, the District Court found it to be extremely rare and highly commendable that Petitioner had, *of his own volition and post-offense*, completely terminated and withdrawn from criminal conduct and association, made extraordinary efforts at self-rehabilitation, including counseling in a twelve-step program with Adult Children of Alcoholics, and had also given extraordinary "community restitution," in the form of participating in benefits and musical concerts[9] for an extremely wide base of charitable and community organizations, some of which have drug abuse prevention goals and all of which are detailed in the District Court's findings and corroborated by letters from some sixty-four (64) concerned, responsible citizens from just about every walk of life imaginable. The District Court also found that Petitioner's level of remorse, as shown by his

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8The Fifth Circuit reversed and remanded for resentencing, not because no reasons were given, but rather, because those given were deemed offensive to the guidelines. *See O'Brien*, 950 F.2d at 969.

9Petitioner was and is an accomplished, professional electric guitarist.

extraordinarily sincere allocution and his overwhelmingly, intensive acceptance of responsibility, was also of a kind and to a degree rarely encountered. Nonetheless, the Fifth Circuit merely noticed that Petitioner had already received his acceptance of responsibility points and that its decision in *United States v. Lara-Valesquez*, 919 F.2d 946, 955 (5th Cir. 1990), foreclosed any downward departure based on "rehabilitative potential."

There is conflict amongst the circuits on this issue. If Petitioner had been sentenced in either the First, Sixth, or District of Columbia Circuits, his downward departure would have been upheld, especially on these detailed findings from the District Court. *Cf. Maddalena, supra* [wherein the Sixth Circuit held that the sentencing court may consider a "defendant's efforts to stay away from drugs as a basis for departing"]; *Sklar, supra* [wherein the First Circuit held that, although admittedly reserved for cases that are "few and far between," *presentence rehabilitation* can be the basis for a downward departure]; *Harrington, supra* [wherein the District of Columbia Circuit, choosing to follow the First Circuit's lead in *Sklar*, held that a defendant's *post-offense rehabilitative effort* may certainly be considered for acceptance of responsibility purposes and, in rare cases, also further reductions may well be in order, if of such an extraordinary nature as to go beyond that contemplated by an acceptance of responsibility reduction]; *Lopez, supra* [another decision from the District of Columbia Circuit that recognizes that certain tragic upbringing, such as repeated exposure to domestic violence, can transcend forbidden socioeconomic status considerations and, in the extraordinary case, serve as the basis for a downward departure].

CONCLUSION

For these reasons, Petitioner respectfully prays that this Honorable Court will grant this Application for Writ of Certiorari for the reasons hereinabove stated and that he will be given the opportunity to further brief and argue the issues raised herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Lewis Dickson, a member of the Bar of this Court, certifies that pursuant to Rule 28, he served the preceding Petition for Writ of Certiorari by enclosing three (3) copies of this document in an envelope, first-class postage prepaid and addressed to:

1. The Honorable Rex E. Lee
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_____

Lewis Dickson

APPENDIX A

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IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

UNITED STATES OF AMERICA	§	
	§	
VS.	§	CRIMINAL NO.
	§	A-89-CR-108
	§	
JOHN DEREK O'BRIEN	§	
CHARLES DOUGLAS PACE	§	
JOHN KOUNTZ TREANOR	§	

ORDER

Before the Court are motions to suppress filed by each of the Defendants in this case, John Derek O'Brien, Charles Douglas Pace, and John Kountz Treanor. Before making its formal findings of fact and conclusions of law, the Court will briefly summarize the background facts and the legal arguments in this case.

On or about June 15, 1989, agents of a joint task force of DEA agents and the Organized Crime Unit of the Austin Police Department executed four search warrants which are the subject of these motions to suppress. One of the warrants complained of, numbered A-89-216M, was issued for a barn located approximately 1/2 mile east of the intersection of Lambert Road and Farm Road 973 in Travis

County, Texas. The execution of this warrant resulted in the seizure of 796 growing marijuana plants, a prescription bottle in Pace's name with marijuana seeds inside, and the arrest of the three named Defendants. Pursuant to these arrests, the Defendants' persons were searched. Among the items seized from O'Brien's person was a key to the padlock securing the entrance gate to the property. Identical keys were also found on Pace and Treanor's persons. Also found on Treanor was a key to safe deposit box number 6797 located at NCNB in Austin, Texas.

The other warrants complained of were issued based on information obtained from the execution of the Lambert Road search warrant. These warrants were issued for: (1) the residence of Derek O'Brien and John Kountz Treanor at 1721 Palma Plaza in Austin, Texas resulting in the seizure of documents, photographs, ledgers, catalogs, accounts, receipts, magazines, a small amount of marijuana, and $5,665.00 in cash; (2) the residence of Charles Douglas Pace at 11900 FM 812 Del Valle, Texas resulting in the seizure of a triple beam balance scale, a small quantity of marijuana, and various business and phone records; and (3) the safety deposit box of John Kountz Treanor, resulting in the seizure of a key to the gate of the Lambert Road property where the barn is located.

Defendants make several arguments concerning the invalidity of the affidavit supporting the Lambert Road warrant. First, Defendants argue that the affidavit was based on stale information obtained two years earlier by a confidential informant who, while looking for some lost livestock on the property, looked into the barn and saw some live marijuana plants growing.

The Government argues that this issue is moot since just a few days before the issuance of the search warrant, two officers entered the Pace property and, looking through a small hole in the siding of the barn, saw several hundred live marijuana plants growing inside. The search warrant

was issued based on this information in the affidavit.

Second, Defendants argue that the officers unlawfully entered private property when they went onto the Pace property to look through the small crack in the barn. Defendants claim this action was a "search" within the meaning of the Fourth Amendment and that the search was invalid for lack of probable cause, lack of exigent circumstances, and lack of a warrant. Defendants further argue that the search warrant which was issued as a result of this allegedly invalid search is invalid and any evidence seized during the execution of this warrant should be suppressed.

Finally, Defendants argue that the three warrants issued as a result of the information seized during the execution of the Lambert Road warrant are invalid because they represent the "fruit of the poisonous tree."

The Government argues that the agents' actions did not constitute a search because the barn was part of an "open field."

The Court makes the following findings of fact and conclusions of law.

I. *FINDINGS OF FACT*

The barn is located on a piece of property of approximately forty acres, located at the end of lambert Road in a rural area of Travis County. The owners of record of the property are Robert and Ouida Pace, the parents of Defendant, Charles Douglas Pace. At the entrance of the property there is a gate closed with a lock and chain and a "Beware of Dog" sign on it. The entire property is fenced and there are numerous interior fences. The fences are made of "hog wire" and topped with several strands of barbed wire. "Hog wire" is constructed of horizontal and vertical steel wire in a mesh and designed to block the passage of objects larger than four to six inches in diameter and reaches from the ground to approximately four feet high. The Pace property was being used, at least in part, in the business of

farming or ranching.

The structures located on the property consist of a small wood frame house and storage shed located within 100 feet of the front gate. There is also a wood frame garage on the south end of the property. Immediately behind the garage lies the stock pen and barn area. The barn complex is approximately 156 feet from the house and is separated from the house by an interior fence.

The barn is constructed primarily of corrugated steel panels and is completely enclosed on all sides. The barn was a commercial structure used in the business of farming or ranching. There are no windows in the barn, and the only access into the barn is through two locked doors. A helicopter aerial surveillance of the barn by the police revealed that the top of the barn was made of translucent corrugated sheeting of the type used in greenhouses, but was not so transparent that the police could see through it from the aircraft. From no area outside the property was it possible to see inside the barn.

It is accepted by the general public and residents in this geographical area that a fence and locked gate are a reasonable indication that no one should enter that property without permission. Anyone who crosses such a fence or locked gate without authorization is generally considered a trespasser.

On or about June 12, 1989, two officers entered the Pace property. One officer squeezed through a gap between the main gate and the fence post, and the other officer climbed over the gate. The officers knocked on the door of the house and looked through a window and determined that the house was vacant. The officers crossed at least two other gates, went to the back side of the barn, and found a small hole or opening in the tin siding.

The officers were unable to see inside the barn except by pressing their faces very close to the small hole or opening less than half an inch from the tin siding. Upon

looking inside, the officers saw numerous marijuana plants growing inside the barn. On the basis of this information, a search warrant for the barn was issued.

II. *CONCLUSIONS OF LAW*

Defendants argue that the agents' observations of the marijuana was a "search", and that the search was illegal because the barn was part of the constitutionally protected curtilage of the home or alternatively because it was constitutionally protected as a commercial structure used in the business of farming or ranching. The Government argues that the officers' actions did not constitute a search because the barn was part of an "open field" and because any expectation of privacy surrounding it was not of the type that the Constitution protects.

To be entitled to Fourth amendment protection, it is first necessary to determine whether there was a "search" within the meaning of the Fourth Amendment. In *Katz v. United States*, 389 U.S. 347 (1967), the Supreme Court defined what constitutes a search with a two-pronged test: first, the person claiming Fourth Amendment protection must have manifested to the public that he or she had an actual, or a subjective, expectation of privacy in the area intruded upon by the government; second, that subjective expectation must be one that society would deem reasonable.

With respect to the first issue, the Court finds that the Defendants had a subjective expectation of privacy in the interior of the barn as evidenced by the locked doors leading into the barn.

With respect to the second issue, the Court recognizes that the curtilage of the home has long been given protection as a place where the occupants have a reasonable and legitimate expectation of privacy that society is prepared to accept. *See California v. Ciraolo*, 476 U.S. 207 (1986). At common law, the curtilage has been defined as the area immediately surrounding the home to which the intimate activity of home life extends. *See, e.g., Boyd v. United*

States, 116 U.S. 616 (1886); *Oliver v. United States*, 466 U.S. 170, 178, 182, n.12 (1984). The curtilage is considered to be part of the home itself for Fourth Amendment purposes. *See, e.g., Oliver v. United States*, 466 U.S. 170, 180 (1984); *United States v. Van Dyke*, 643 F.2d 992, 993-94 (4th Cir. 1981); *United States v. Williams*, 581 F.2d 451, 453 (5th Cir. 1978).

The Supreme Court, however, has drawn a line as to what expectations are reasonable in the open areas beyond the curtilage of a dwelling. The "open field" doctrine was first announced in *Hester v. United States*, 265 U.S. 57 (1924). In *Hester*, Justice Holmes explained that "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law." *Id.*, at 59. The Supreme Court has not yet attempted to definitively mark the boundaries of what constitutes an "open field", *See Dow Chemical Co. v. United States*, 476 U.S. 227, 236, n.3 (1986), but has indicated that the term "may include any unoccupied or undeveloped area outside of the curtilage." *Oliver v. United States*, 466 U.S. 170, 181, n.11 (1984). The Court further stated that "[a]n open field need be neither 'open' nor a 'field' as those terms are used in common speech." *Id.* A governmental intrusion upon an open field is not considered to be a "search" within the meaning of the Fourth Amendment, even if such an intrusion would be a trespass at common law. *Id.*, at 183.

The first issue before the Court is whether the barn into which the officers peered was within the curtilage of the home or part of an open field for Fourth Amendment purposes. The Court has reviewed the myriad of lower state and federal court opinions cited by Defendants holding that a barn is part of the curtilage of the home. Nevertheless, in *United States v. Dunn*, 107 S.Ct. 1134 (1987), a case almost identical to the instant case, the Supreme Court held that a

barn was not within the curtilage of the home.

In *Dunn*, there was a ranch completely encircled by a perimeter fence, containing several interior barbed wire fences, including a fence around the house approximately fifty yards from the barn, and a wooden fence enclosing the front of the barn. The barn had an open overhang and locked, waist-high gates. Without a warrant, officers crossed the perimeter fence, several of the barbed wire fences, and the wooden fence in front of the barn. They did not enter the barn but stopped at the locked waist-high gate and shined a flashlight through a mesh netting and observed what appeared to be a drug laboratory. The officers returned a few days later with a search warrant and executed it, arresting the Defendant in that case. The Western District of Texas denied the motion to suppress. The Fifth Circuit reversed the District Court, and the Supreme Court reversed the Fifth Circuit, affirming the District Court.

The Supreme Court considered four factors in making its determination of whether the barn is within the curtilage of the home. Those four factors are as follows: (1) the proximity to the home of the area claimed to be curtilage; (2) whether the area is included within an enclosure surrounding the home; (3) the nature of the uses to which the area is put; and (4) the steps taken by the resident to protect the area from observation by people passing by. *Dunn*, 107 S.Ct. at 1139. The Court stated that these factors are not to be mechanically applied to yield a "correct" answer to every extent of curtilage question. Nevertheless, the Court emphasized that these factors are useful analytical tools to the degree that they bear upon the centrally relevant consideration; that is, whether the area in question is so intimately tied to the home itself that it should be placed under the home's "umbrella" of Fourth Amendment protection.

(1) *The Proximity to the Home*

The area in question should be sufficiently close to

the home to support the claim that it should be treated as an adjunct of the home. In *Dunn*, the barn was located 60 yards from the house. The Court found that "this substantial distance supports no inference that the barn should be treated as an adjunct of the house." *Dunn*, 107 S.Ct. at 1140. In the instant case, the barn was located 52 yards from the house. The Court finds that this distance is also substantial enough to rebut any argument that the barn should be treated as an adjunct of the house.

(2) *The Area Within the Enclosure Surrounding the House*

The area in question should be readily identifiable as part of the curtilage of the home. In *Dunn*, the Court found that the fence surrounding the residence served to demark a specific area of land immediately adjacent to the house that is readily identifiable as part of the curtilage. Moreover, the Court found that the barn stood out as a distinct portion of the property, separate from the house. In the instant case, the barn was separated from the area surrounding the house by a fence. The barn was approximately 116 feet from that fence. As in *Dunn*, the fence surrounding the house served to demark a specific area of land that is readily identifiable as part of the curtilage. The barn also stood out as a distinct portion of the property separate and apart from the curtilage of the house. This factor weighs against a finding that the barn is within the curtilage of the house.

(3) *The Nature of the Uses to Which the Area is Put*

The nature of the uses to which the area is put should be of the type that are associated with the intimacies of the home. In *Dunn*, the Court stated that it was "especially significant that the law enforcement officials possessed objective data indicating that the barn was not being used for intimate activities of the home." *Id.* In *Dunn*, it was the smell of phenylacetic acid and the fact that a truck was backed up to the barn that indicated to the officers that no

activities associated with the intimacies of the home were occurring in the barn. In the instant case, it was simply the vacancy of the house and the lack of any signs of permanent residence anywhere on the property that suggested to the officers that no activities associated with the intimacies of the home were occurring in the barn. In either case, the issue is not whether the officers had objective data to lead them to believe illegal activities were occurring in the barn. This would simply be another way of saying probable cause existed to search the barn. The issue rather is whether the officers had objective data to lead them to believe that activities associated with the intimacies of the home were occurring in the barn. The Court finds that the officers in the instant case had objective data to lead them to believe that no activities associated with the intimacies of the home were occurring in the barn. This factor also weighs against a finding that the barn is within the curtilage of the house.

(4) *The Steps Taken to Prevent Observation by the Public*

The next factor is whether the Defendants took steps to prevent observation by the public. This factor is slightly more complex than the first three. In *Dunn*, the Court found that the Respondent had done little to prevent observation of the outside of the barn by people standing in open fields. The Court stated that the fences were designed and constructed to corral livestock, not to prevent persons from observing what lay inside the fenced areas.

In the instant case, it can also be said that the type of fences used were not designed to prevent the barn from being seen by people standing in open fields. However, Defendants did take substantial measures to keep people out of the fenced areas and from seeing what was inside the barn. Here, although the officers could see the outside of the barn itself while standing in open fields, it is uncontroverted that they could not see through the hole into the barn without approaching the barn and pressing their faces up to within

less than an inch of the siding.

In *Dunn*, the Court did not deal expressly with the issue of whether the officers could see inside the barn from outside the fenced area. The Court merely found the Respondent's failure to prevent observation of the outside of the barn by the public to be significant as the fourth factor in its determination that the barn area was not part of the curtilage of the home.

Keeping in mind that the Supreme Court has stated that these four factors are not to be mechanically applied to yield a correct result in every case, this Court is of the opinion that the real issue is not whether a person standing in an open field could see the outside of the barn, but whether a person standing in an open field could see the inside of the barn. It is uncontroverted that the inside of a commercial structure is entitled to similar protections as a private dwelling for Fourth Amendment purposes. *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978); *See v. City of Seattle*, 387 U.S. 307 (1967). Before the Court can reach the issue of the propriety of the observation of the inside of the barn, the Court must determine whether the officers were in violation of the Fourth Amendment when they crossed the fences to get to the barn.

The Supreme Court has established that the mere fact of common law trespass does not mean that a violation of the Fourth Amendment has occurred. *See Oliver v. United States*, 466 U.S. 170, 182-83; *United States v. Dunn*, 107 S.Ct. 1134, 1141. Therefore, the fact that common law trespass has occurred would not render observations of the interior of a protected building improper unless the trespass itself were a violation of the Fourth Amendment.

In *Dunn*, the officers crossed several fences, stood immediately outside the barn, and used a flashlight to see through the mesh that hung over the "open front" of the locked waste-high gate of the barn. The Court held that "no constitutional violation occurred ... when the officers crossed

over respondent's ranch-style perimeter fence, and over several similarly constructed interior fences, prior to stopping at the locked front gate of the barn." *Id.* at 1141. The Court emphasized that, "there is no constitutional difference between police observations conducted while in a public place and while standing in the open fields". In its holding, the Court referred to *Texas v. Brown*, 460 U.S. 730, 739-740 (1983) in which the Court held that it is "beyond dispute" that the action of a police officer in shining his flashlight to illuminate the interior of a car, without probable cause to search the car, "trenched upon no right secured ... by the Fourth Amendment."

Defendants make much of the fact that in *Dunn*, the officers looked through the barn's "open front" to see the drug laboratory. In the instant case the officers had to be within less than an inch of the siding to see inside. Defendants imply that there is a difference between standing next to a barn and shining a flashlight through a mesh netting and standing next to a barn and looking through a small crack in the siding. According to Supreme Court precedent, however, the fact that there was an "open front" in *Dunn* is irrelevant, if the barn area immediately surrounding the barn is in fact an open field. This Court, however, has not yet determined whether the area immediately surrounding the barn is part of an open field.

Based on the first three factors set forth in *Dunn*, the Court finds that the barn and the area immediately surrounding the barn are not within the curtilage of the home. First, the barn area is a substantial distance from the home. Second, the barn area is separated from the home by a fence which serves to physically distinguish the home area from the barn area. Third, the officers relied on objective data which indicated to them that the barn area was not being used for activities intimately associated with home life. For these reasons, the barn cannot be said to be within the constitutionally protected curtilage of the home.

Defendants argue that even if the barn area was not within the curtilage of the home, it is protected as a commercial structure with a curtilage of its own. Neither the Fifth Circuit nor the Supreme Court have resolved the issue of whether the area immediately surrounding a commercial structure has constitutional protection similar to that of the area surrounding the home.

In *Dow Chemical Co. v. United States*, 476 U.S. 1819 (1986), the Court held that aerial photography of the company's industrial complex (the area outside of the commercial buildings but within the fenced complex) was not a "search" within the meaning of the Fourth Amendment. With respect to the open areas surrounding the commercial buildings, the Court stated that the area fell "somewhere between 'open fields' and curtilage, but lacking some of the critical characteristics of both." *Dow*, 476 U.S. at 236. The Court held that where aerial surveillance was concerned, the area surrounding commercial buildings in a complex such as Dow's did not have protection similar to that of the curtilage of a home. The Court left open the question of whether the area surrounding commercial structures had protection similar to that of a the curtilage of a home where physical entry is concerned. *Id.*, at 240, n.7.

In *Dunn*, the Supreme Court had an opportunity to deal with the business curtilage issue where physical entry was concerned because the officers in that case stood next to the barn to see into it. Yet the Court did not deal directly with this issue. The Court simply found that the barn area was not within the curtilage of the home and, thereafter, referred to it as an open field.

The Court never made a finding that the barn either was or was not a commercial structure entitled to Fourth Amendment protection. It did assume "for the sake of argument" that the barn was entitled to Fourth Amendment protection as a commercial structure. Even assuming the interior of the barn was constitutionally protected as a

commercial structure, the Court stated that "standing as they were in the open fields, the Constitution did not forbid them to observe the phenylacetone laboratory located in respondent's barn." *Id.* at 1141. The Court reiterated the point by stating, "the fact that the objects observed by the officers lay within an area that we have assumed [for the sake of argument], but not decided, was protected by the Fourth Amendment does not affect our conclusion." *Id.*

This Court also finds that although the barn itself may be a commercial structure entitled to Fourth Amendment protection, Defendants have not shown that there is any reason to extend the protection afforded to the curtilage of the home to the area immediately surrounding a commercial structure. The area surrounding the home is protected because the types of activities that occur there are traditionally associated with the intimacies of home life. There is no similar rationale for extending this protection to the area surrounding a commercial structure. The Motion to Suppress evidence seized in the execution of the Pace property search warrant is, therefore, DENIED. As a result of this ruling, the issue of whether the affidavit was based on stale information is now moot.

The motion to suppress the evidence found during the execution of the search warrant issued for the safety deposit box of John Kountz Treanor based on the claim that such evidence is fruit of the poisonous tree is also DENIED. The Court also rejects the arguments that the evidence found during the execution of the warrants issued for the search of 1721 Palma Plaza, Austin, Texas, and 11900 FM 812, Del Valle should be suppressed as fruit of the poisonous tree.

Defendants each argue in the alternative that even if the search of the Pace property is upheld, the evidence seized during the execution of the search warrants issued for the residence of O'Brien and Treanor at 1721 Palma Plaza, Austin, Texas and the search warrant issued for Pace's residence at 11900 FM 812, Del Valle, Texas should be

suppressed because the affidavits supporting those warrants do not establish probable cause. Defendants also argue that the mere fact that they were arrested does not establish probable cause to search their residence.

The affidavits in question were filed by officer Douglas Cortinovis. In his affidavit, Mr. Cortinovis did not suggest that Defendants' residences should be searched merely because Defendants were arrested, but because evidence obtained during the execution of the Lambert Road search warrant established probable cause to believe Defendants were engaged in the business of growing and selling marijuana. Officer Cortinovis also swore based on his two years of experience as a police officer for the City of San Antonio and six years of experience as part of a DEA task force that people involved in this type of business usually keep quantities of marijuana, scales, business receipts and ledgers, and phone records related to this business in their home. The search warrants were issued on the basis of this information. The Court finds that the affidavits of Douglas Cortinovis established probable cause for the issuance of the search warrants in question. The Motions to suppress the evidence obtained during the execution of the search warrants issued for 1721 Palma Plaza, Austin, Texas, and 11900 FM 812 Del Valle, Texas are DENIED.

Finally, Defendant Pace, through his attorney, also argues in his brief that statements made by him after his arrest should be suppressed because they were made involuntarily, and because he was unlawfully detained. The Court finds based on its holding concerning the validity of the Lambert Road search warrant that Defendant Pace was lawfully detained. Regarding the voluntariness of the statements made after his arrest, the Court finds based on the testimony of officer Danny Hinkle at the evidentiary hearing that Pace's statements were made voluntarily after he received the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966). The Motion to Suppress the oral

statements of Defendant Pace is DENIED.

IT IS SO ORDERED.

SIGNED AND ENTERED this 4th day of January, 1990.

/S/ JAMES R. NOWLIN
James R. Nowlin
United States District Judge

APPENDIX B

FILED
SEP 6 4 15 PM '90
U.S. CLERK'S OFFICE
BY /S/
DEPUTY

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

UNITED STATES OF AMERICA	§	
	§	
VS.	§	CRIMINAL NO.
	§	A-89-CR-108(3)
	§	
JOHN KOUNTZ TREANOR	§	

ORDER

Before the Court is Defendant, John Kountz Treanor's Motion For Reconsideration. The Court has reviewed the Motion and its Order denying the Motion to Suppress entered January 4, 1990, and is of the opinion that the Motion lacks merit and should be denied. The Court, however, is of the opinion that its January 4, 1990 Order should be clarified.

Defendant argues that the Court did not rule on whether the barn in the instant case was a commercial structure. The Court, on page 15 of the Order, stated, "This Court also finds that although the barn itself may be a commercial structure entitled to Fourth Amendment protection, Defendants have not shown that there is any reason to extend the protection afforded to the curtilage of the home to the area immediately surrounding a commercial structure." The Court now finds based on the evidence adduced in the record that the barn is in fact a commercial

structure, but for the same reasons stated in its original opinion, finds that it does not have a curtilage entitled to the same Fourth Amendment protection afforded to the curtilage of a home.

SIGNED AND ENTERED this 6th day of September, 1990.

/S/ JAMES R. NOWLIN
James R. Nowlin
United States District Judge

APPENDIX C

FILED
OCT 5 1 40 PM '90
U.S. CLERK'S OFFICE
BY /S/
DEPUTY

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

UNITED STATES OF AMERICA	§	
	§	
VS.	§	CRIMINAL NO.
	§	A-89-CR-108
	§	
JOHN DEREK O'BRIEN	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Federal Sentencing Guidelines Manual, § 5K2.0. provides that pursuant to "18 U.S.C. § 3553(b) the sentencing court may impose a sentence outside the range established by the applicable guideline, if the court finds 'that there exists an aggravating or mitigating circumstance of a kind, or to a degree not adequately taken into consideration by the Sentencing Commission in formulating the guidelines.' Circumstances that may warrant departure from the guidelines pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance. The controlling decision as to whether and to what extent departure is warranted can only be made by the court at the time of sentencing." U.S.S.G. § 5K2.0. at 276.

As authorized under this provision, the Court finds that mitigating circumstances exist in the instant cause which justify a downward departure in the sentencing of the

Defendant. The mitigating circumstances considered by the Court are of a kind or to a degree not adequately taken into account by the Sentencing Commission in formulating the Sentencing Guidelines. The following are findings and conclusions of the Court with regard to the mitigating circumstances in this cause:

Acceptance of Responsibility: § *3E1.1.*

(1) The Court finds that the Defendant's acceptance of responsibility, although a factor taken into consideration by the Sentencing Commission, is present to a degree substantially in excess of that which is ordinarily involved in similar crimes. The Defendant's voluntary termination and withdrawal from criminal conduct and associations, his voluntary restitution to the community through involvement in community affairs and charitable causes prior to adjudication of guilt, his voluntary and truthful admission to this Court at his suppression hearing, and his voluntary work in drug abuse prevention programs are actions which reflect acceptance of responsibility to a degree substantially greater degree than is ordinarily present in similar crimes. The Court found further evidence of the Defendant's acceptance of responsibility for his criminal conduct in that he and his counsel furnished the Court with letters from numerous individuals which showed that the Defendant had acknowledged his crime. Most of the letters urged the Court to consider actions by the Defendant which demonstrate his contrition and recognition of his wrongdoing.

(2) The degree of the Defendant's remorse with respect to his criminal conduct was reflected not only in the letters, but also by the Defendant's actions. At sentencing, the Defendant described to the Court his efforts at self-rehabilitation and restitution to the community, which include participation in benefits and concerts for such groups as The Brackenridge Children's Hospital, The Wilderness

Counselling Group (a drug counselling organization for teenagers), Meals-on-Wheels, The Battered Women's Center, Austin public schools, federal prisons, Parents Anonymous, and participation in a tutoring program at Dawson Elementary School. Further, the Defendant has sought counselling through his involvement in a twelve-step program with Adult Children of Alcoholics.

(3) In addition to the foregoing, the Court offers as authority for its downward departure the recent opinion of the D.C. Circuit in *U.S. v. Harrington*, 741 F. Supp. 968 (D.D.C. 1990). There, the court departed downward to 60-month statutory minimum from 97-121 month range where the defendant was a first-time drug offender with a long history of addiction because of the defendant's substantial progress in drug treatment programs after his arrest, which the court believed indicated a likelihood of successful rehabilitation. The Court stated that "[e]xamination of the four corners of the Guidelines and official comment on them provides no indication that the Commission addressed the case of a first offender drug addict found by expert opinion to be a likely candidate for successful treatment for drug addiction.... Neither does the Sentencing Commission's rejection of addiction as a factor to be considered in sentencing ... establish that the Sentencing Commission considered the likelihood of successful treatment for addiction." The court felt that Congress "did not foreclose consideration of a defendant's prospect of rehabilitation as a factor to be considered in determining the duration of a prison sentence." *See also U.S. v. Maddalena*, 893 F.2d 815 (6th Cir. 1989) (sentencing court may consider "defendant's efforts to stay away from drugs as a basis for departing"); *United States v. George*, No. 89-7119 (5th Cir. Sept. 5, 1990) ("the court is not confined solely to matters included in them and may base 'its sentencing decisions on matters not raised in the presentence report'").

(4) The Court is of the opinion that the Defendant's allocution at sentencing was sincere, and further that the Defendant's actions are a mitigating factor demonstrating acceptance of responsibility for his criminal conduct that is of a kind and to a degree not adequately taken into consideration by the Sentencing Commission in formulating the guidelines. Based on all the evidence before it, and on the Court's view that both the Sentencing Guidelines and the relevant case law allow the Court to exercise discretion when confronted with unique circumstances, the Court finds that the interests of justice would be best served by a downward departure in this case.

(4) The Court incorporates by reference into these findings the letters it received on the Defendant's behalf from numerous citizens, named as follows:

1. Gary Liebeskind	Director, Stress Management and Biofeedback Programs.
2. Rick Winking	Musician/Member of A.C.O.A.
3. Katherine Enyart	Production Artist/Member of A.A.C.A.
4. C. Daniel Wheelus	Business and Commerce Attorney.
5. Rochelle Satterfield, Ph.D.	Psychologist.
6. Stevie Ray Vaughan	CBS/Epic recording artist.
7. Ricardo C. Ainslie, Ph.D.	Clinical Psychologist and Director of Counseling; Psychology Doctoral Training Program at the U of T in Austin.
8. Susan L. Piver	International Manager of Rykodisc, a record label and closest personal friend of Derek O'Brien.

9. Clyde D. Smith, M.D. F.A.C.S.	Met Derek O'Brien when Ms. Piver was hospitalized.
10. Vicki Trisler	Registered Nurse, met Derek O'Brien during Ms. Piver's hospital stay.
11. Gary W. Kansteiner	Attorney in Austin, has known Derek O'Brien since 1973.
12. Marcy E. Holloway	Attorney in Austin, has known Derek O'Brien for approximately 10 years.
13. Donna McClure	General Manager of an Austin based record label and close personal friend of Derek O'Brien.
14. Ray Hennig	Owner and Operator of the Heart of Texas Music stores; has known Derek O'Brien for 20 years.
15. John C. Andrews	Owner of Texas Ceiling Fans in Austin, has known Derek O'Brien for approximately 10 years.
16. Edwin O. Wilson	Involved in Austin arts and civil affairs for 25 years.
17. Albert Collins	Professional musician since 1950, has known Derek O'Brien since 1975.
18. Patterson Barrett	Owner of Barrett & Harwell Music, has known Derek O'Brien for approximately 16 years.
19. Glenn Fukunaga	Owns Glenn Fukunaga Restorations, Bindings & Cases in Austin, has known Derek O'Brien since 1976.

20. Jerry Heidenreich	Has known Derek O'Brien for some 25 years. He is an Olympic Gold Medalist and now President of SRSP Aquatic Programs and Electronic Pool Purification in Dallas.
21. C.R. Beck	Film Soundtrack Producer/ Recording Studio Owner/ Recording Session Musician. Has been a close personal friend of Derek O'Brien for approximately 15 years.
22. J. P. Whitefield	Has known Derek O'Brien for approximately 19 years. A retired professional musician of 30 years and now a Field Service Engineer for solid Systems Incorporated.
23. Georgiane R. Burnett	Personal friend of Derek O'Brien for 10 years.
24. Danny Roy Young	Small Businessman in Austin since 1956 and has known Derek O'Brien for approximately 5 years through various charity civic groups.
25. Mike Rogan	Personal friend of Derek O'Brien since 1968, Mr. Rogan has served as an administrative and environmental attorney for several Texas State Government Agencies. He is now in the horticultural business.

26. Paul Henry Ray	Record producer and close personal friend of Derek O'Brien.
27. Frieda Borth	Professional musician, has known Derek O'Brien since 1974.
28. T. O. Murphey, Jr.	Real Estate Developer.
29. Frank C. Cooksey	Assistant U.S. Attorney (1965-1970); Department of Justice in Houston and Washington; Special Assistant Attorney General of Texas; Mayor of Austin.
30. Rebekah Yonan	Adopt-a-School Coordinator; Elementary Reading Teacher at Dawson Elementary School within the Austin ISD.
31. Hammond Scott	Presently a record producer; served as Assistant District Attorney in the criminal district courts in New Orleans, Louisiana.
32. Mrs. Theodore A. Bell	Mother of a very close personal friend.
33. Louise R. Piver	Mother of a very close personal friend.
34. Kay Sutherland-Corsun	Stepsister/Graduate student of Social Work at The University of California, Sacramento/ Internship presently at Adult Outpatient Services, San Joaquin County Mental Health Services.
35. Cameron Randle	Executive Vice President and partner in the Ention Corporation/professional

	associate and friend of Derek O'Brien.
36. Ann L. Fry, MSW, CSW-ACP	Clinical social worker in private counseling practice in Austin.
37. Carol P. Hanna	Tax accountant with Arthur Anderson & Company.
38. Harold Sutherland	Derek O'Brien's stepfather.
39. Eleanor Welch Sutherland	Derek O'Brien's mother.
40. Ron Young	Music writer for San Antonio Light.
41. Tom Van Zandt	Attorney and Environmental consultant; partner in Horizon Environmental Services, Inc.
42. Jody Denberg	Music Director for KLBJ-AM/ KLBJ-FM in Austin, Texas.
43. Delbert McClinton	Singer/Songwriter.
44. Nancy Ebe	Attorney/Partner in Johnson & Gibbs in Austin currently a shareholder in the law firm of Matthews & Branscomb in Austin.
45. Bonnie Raitt	Capitol Recording Artist, President, The Going Raitt, Los Angeles, California.
46. Ernie Gammage	Director of Membership Development, President, Austin Music Industry Council.
47. Stuart Sullivan	Recording Engineer.
48. Jay Trachtenberg	Medical Social Worker at the Children's Hospital of Austin at Brackenridge/work with chronically ill children/their families.
49. Casey Monahan	Music writer.
50. Marcia Ball	Recording artist.

51. Jennifer Riggs	Assistant attorney general for the State of Texas.
52. Jimmie Vaughan	The Fabulous Thunderbirds.
53. Fran Christina Kim Wilson Preston Hubbard	Recording artists.
54. Dan Forte	Editor-at-Large, Guitar World, Contributing Editor, Austin Chronicle.
55. David Adelson	Vice-President/Managing Editor, HITS Magazine.
56. David H. Walter	Attorney with Byrd, Davis & Eisenberg and college friend of Derek O'Brien.
57. Nancy Coplin	Founding Board Member of the Women's Chamber of Commerce of Texas and current Chair of the City of Austin Music Commission.
58. Kate Wagster	Owner of "By George" retail store in Austin.
59. Keith Winking	Director of Jazz Studies at Southwest Texas State University.
60. Karen Kennard-Gordon, C.A.D.A.C.	Counselor for Colorado and Fayette Counties' Council on Drug and Alcohol Abuse.
61. John T. Davis	Newspaper columnist for the *Austin Light* and the *Austin Chronicle*.
62. Suzanne Colonna	Mollie Dawson Elementary PTA President and an employee of Dr. J. W. Shriver, personal friend of Derek O'Brien.

63. Randy McCall	President, Austin Federation of Musicians.
64. Bill Bentley	Senior Publicist for Warner Brothers Records.

ACCORDINGLY, the Court adopts the foregoing as its FINDINGS AND CONCLUSIONS to support the downward reduction from the Sentencing Guidelines in this cause.

SIGNED AND ENTERED this 5th day of October, 1990.

/S/ JAMES R. NOWLIN
James R. Nowlin
United States District Judge

APPENDIX D

UNITED STATES of America, Plaintiff-Appellee
Cross-Appellant,
v.
John D. O'BRIEN, Defendant-Appellant
Cross-Appellee.
No. 90-8549.
United States Court of Appeals,
Fifth Circuit.

Dec. 30, 1991.

Rehearing Denied Feb. 13, 1992.

Defendant was convicted in the United States District Court for the Western District of Texas, James R. Nowlin, J., pursuant to his guilty pleas. of two counts of conspiracy and possession with intent to distribute marijuana, and he appealed challenging denial of motion to suppress. The Court of Appeals, King, Circuit Judge, held that: (1) there was probable cause for search of defendant's home; (2) community ties were not valid reason for downward departure from Sentencing Guidelines; and (3) notion that defendant possessed redeeming characteristic of being "worthwhile person" did not provide adequate basis for downward departure.

Conviction affirmed, sentence vacated and matter remanded for resentencing.

1. Drugs and Narcotics 185(2)

Evidence seized from barn during execution of search warrant, combined with officer's experience with business practices of drug traffickers, furnished sufficient probable cause for search of defendant's home. U.S.C.A. Const. Amend. 4.

2. Criminal Law 1297

Defendant's community ties cannot be used to depart below applicable Sentencing Guidelines range. U.S.S.G. § 5H1.6, p.s., 18 U.S.C.A.App.

3. Criminal Law 1297

Notion that defendant possessed redeeming characteristic of being "worthwhile person" did not provide adequate basis for downward departure from applicable Sentencing Guidelines range. U.S.S.G. § 1B1.1 *et seq.*, 18 U.S.C.A.App.

4. Criminal Law 1298

Remorse and acceptance of responsibility for crime defendant expressed at his allocution could not be valid reason for downward departure from Sentencing Guidelines after reduction in base offense level was made for acceptance of responsibility. U.S.S.G. § 3E1.1, 18 U.S.C.A.App.

5. Criminal Law 1297

Rehabilitative potential is not valid basis for downward departure from applicable Sentencing Guidelines range. U.S.S.G. § 1B1.1 *et seq.*, 18 U.S.C.A.App.

Dick DeGuerin, DeGuerin & Dickson, Houston, Tex., for defendant-appellant cross-appellee.

LeRoy Morgan Jahn, Diane D. Kirstein, Asst. U.S. Atty., San Antonio, Tex., for plaintiff-appellee cross-appellant.

Appeals from the United States District Court for the Western District of Texas.

Before POLITZ, KING and JOHNSON, Circuit Judges.

KING, Circuit Judge:

John D. O'Brien pled guilty to two counts of conspiracy and possession with intent to distribute marijuana in violation of 21 U.S.C. §§ 841(a)(1) and 846, reserving the right to appeal the denial of his motion to suppress evidence

seized from a barn and from his home. He was sentenced to 12 months imprisonment, a five year term of supervised release, a $10,000 fine and a $100 special assessment. O'Brien appeals the denial of his suppression motion and the government appeals the sentence.

[1] O'Brien was arrested along with Charles D. Pace and John K. Treanor following the execution of a search warrant in a barn in Travis County, Texas. The factual background relevant to O'Brien's appeal is detailed in our opinion in *United States v. Pace*, 950 F.2d 961 (5th Cir. 1991). O'Brien's appeal raises the same issues as did Pace's with respect to denial of the motion to suppress the evidence seized from the barn. O'Brien also raises the same objection as did Pace with respect to the evidence seized from the home he shared with Treanor. We adopt the analysis in *Pace* as it applied to the search of the barn. As in *Pace*, we also find that the evidence seized from the barn, combined with the officers' experience with the business practices of drug traffickers, furnished sufficient probable cause for a search of the home of O'Brien and Treanor. We therefore affirm the denial of the suppression motion.

We next consider the government's appeal of O'Brien's sentence. The probation officer calculated a guideline range of 41 to 51 months imprisonment, based on a total offense level of 22 and a criminal history score of zero. *See* U.S.S.G. Sentencing Table. The district judge granted a two-level reduction in the base offense level for acceptance of responsibility, resulting in a guideline range of 33 to 41 months. He then departed downward to a total term of imprisonment of 12 months after stating that "there is in existence in your case the unusual factor of your work in the community and your interest in providing assistance to those who are less fortunate than you that appears in the record."

The government initially argues that the sentence should be vacated because the district court failed to explain its reasons for departing downward. A sentencing court may

depart from the guideline range if it finds aggravating or mitigating circumstances that the guidelines do not adequately take into account, 18 U.S.C. § 3553(b), but it is clear that the court must articulate its reasons for departing. *Id.* § 3553(c); *United States v. Huddleston*, 929 F.2d 1030, 1031 (5th Cir. 1991); *United States v. Murillo*, 902 F.2d 1169, 1172 (5th Cir. 1990). Although a reading of the transcript of the sentencing hearing reveals that the judge was somewhat laconic about the particular reasons for departure, we find that the statement quoted in the previous paragraph constitutes at the very least a statement of the reasons for the imposition of a sentence outside the guideline range as contemplated by 18 U.S.C. § 3553(c). This is not to say that the court's explanation was adequate. (We will address that question momentarily.) We merely hold that reasons were put forward for the departure, and decline to vacate the sentence on the ground that the district judge gave no explanation at all.

The government is correct, however, that the reasons proffered by the district judge were insufficient to justify a downward departure. We divine two separate but related reasons in the district judge's statement, one which appears on the face of the statement and one which seems fairly to be inferred. First, it is obvious that the judge took into account O'Brien's ties to the community and his history of community service. The PSI indicated that O'Brien, a musician, had played benefit concerts and had a history of association with charitable causes in the Austin area. O'Brien's allocution was devoted in part to describing his longstanding ties to the area and his charitable work. Moreover, the judge referred to the many letters of support he had received from friends of O'Brien which "provide a glimpse of you as basically a worthwhile person, a person who has been interested in doing generous things for the community and for people who were in need." Second, it appears that the judge took into account his general view that

O'Brien had redeeming characteristics. While this is not evident in the final statement before sentencing, we believe it can be inferred from the statement that the letters "provide a glimpse of you as basically a worthwhile person...." Unfortunately, neither of these are adequate reasons for departure from the guideline range.

[2] The Sentencing Guidelines provide that "community ties are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range." U.S.S.G. § 5H1.6. In *United States v. Burch*, 873 F.2d 765 (5th Cir. 1989), we recognized that community ties are generally irrelevant to sentencing except in extraordinary cases. *Id.* at 768. We have interpreted the Sentencing Commission's decision in § 5H1 explicitly to eliminate certain factors from sentencing as an indication of the fact that the Commission has already taken those particular factors into account. *United States v. White*, 945 F.2d 100, 102 (5th Cir. 1991). Downward departures are permitted under 18 U.S.C. § 3553(b) only if a mitigating factor was "*not* adequately taken into consideration by the Sentencing Commission in formulating the guidelines." (emphasis added). Thus, in *White*, we held that because § 5H1.1 specifically eliminated youthfulness as a sentencing consideration, the Commission had indeed taken youthfulness into account and a district court could not base a downward departure on this factor. *Id.* The same reasoning applies to the Commission's decision, plainly expressed in § 5H1.6, to eliminate community ties as a relevant factor. Section 5H1 "points to an overall sentencing scheme that is crime-specific rather that offender-specific, and expresses a return "to a philosophy that the punishment should fit the crime...'" *Id.* at 101-02 (citing *United States v. Mejia-Orosco*, 867 F.2d 216, 218 (5th Cir.), *cert. denied*, 492 U.S. 924, 109 S.Ct. 3257, 106 L.Ed.2d 602 (1989)). The factors enumerated in § 5H1 may supply a basis for determining what term of imprisonment is appropriate *within* the applicable Guideline

range, *United States v. Lara-Velasquez*, 919 F.2d 946, 955 (5th Cir. 1990), but they cannot be used to depart below the range. Thus, O'Brien's community ties were an improper basis for downward departure.

[3-5] The notion that O'Brien possessed the redeeming characteristic of being a "worthwhile person" similarly does not provide an adequate basis for departure. In *United States v. Reed*, 882 F.2d 147 (5th Cir. 1989), we rejected the justification that "there is something good in [the defendant]" as a basis for downward departure. *Id.* at 151. There is no meaningful distinction between the court's statement in *Reed* and the statement in this case. Both indicate that a sentence was based on individual characteristics and "partake of the model of penology that Congress rejected in the Sentencing Reform Act." *Burch*, 873 F.2d at 767. Congress intended to eliminate these personal factors from sentencing regardless of a district judge's assessment of their relevance to the justice of any particular sentence.[1]

1The government argues that the district judge relied on two additional reasons for the downward departure: O'Brien's degree of remorse at his allocution and his potential for rehabilitation. While it is not entirely clear to us from the record that these reasons played a part, we express our views on the use of these reasons as part of our mandate when remanding to give "such instructions as the court deems appropriate..." 18 U.S.C. § 3742(e)(1); *United States v. Burch*, 873 F.2d 765, 768 (5th Cir. 1989).

First, the remorse and acceptance of responsibility for the crime O'Brien expressed at his allocution cannot be a valid reason for departure after a reduction in the base offense level has been made under § 3E1.1 of the Guidelines. The Guidelines took acceptance of responsibility into account in § 3E1.1, and the judge determined that this entitled O'Brien to a reduction in his sentence. A second departure for acceptance of responsibility is not warranted. Second, rehabilitative potential is not a valid basis for downward departure. *United States v. Lara-Velasquez*, 919 F.2d 946, 955 (5th Cir. 1990).

We therefore AFFIRM the judgment of conviction, but VACATE the sentence and REMAND for resentencing.

APPENDIX E

UNITED STATES of America, Plaintiff-Appellee
Cross-Appellant,
v.
Charles D. PACE, Defendant-Appellant
Cross-Appellee.
No. 90-8543.
United States Court of Appeals,
Fifth Circuit.

Feb. 24, 1992.

Defendant was convicted in the United States District Court for the Western District of Texas, James R. Nowlin, J., of conspiracy to possess and possession of marijuana with intent to distribute. Defendant appealed. The Court of Appeals, King, Circuit Judge, held that: (1) law enforcement officers did not violate Fourth Amendment's proscription of searches within curtilage of home when they looked inside of barn; (2) area surrounding barn did not enjoy Fourth Amendment protection as "business curtilage"; and (3) errors in sentencing were harmless.

Affirmed.

Opinion 950 F.2d 961, superseded.

1. Searches and Seizures 27

Law enforcement officers did not violate Fourth Amendment's proscription of searches within curtilage of home when they looked inside barn; barn was approximately 50 to 60 feet from house and was separated from house by interior fence, earlier surveillance, including aerial photographs, indicated barn was not being used for activities associated with intimacies of home life, and barn was readily visible from surrounding area. U.S.C.A. Const.Amend. 4.

2. Searches and Seizures 27

Area surrounding barn did not enjoy Fourth Amendment protection as "business curtilage," enabling law enforcement officers to come as close to barn as necessary to look inside without physically entering. U.S.C.A. Const.Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

3. Drugs and Narcotics 188(2)

Search warrant affidavit indicating that police officers had seen evidence of ongoing drug operation during search of barn, but had not found records normally associated with such an operation, provided probable cause for warrant authorizing search of defendant's home. U.S.C.A. Const.Amend. 4.

4. Searches and Seizures 113

Probable cause to search involves practical, commonsense determination by neutral judicial officer whether information provided represents basis for believing crime has been committed. U.S.C.A. Const.Amend. 4.

5. Criminal Law 1208.3(1), 1237

Prison sentence for possession and conspiracy to possess with intent to distribute more than 100 marijuana plants was incorrectly computed at 51 months, based on guidelines range, with nine months added for state-court conviction for assault following pretrial release, even though resultant sentence was equal to statutory minimum; district judge should have started with statutory minimum sentence of 60 months. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a), (a)(1), (b), 406, 21 U.S.C.A. §§ 841(a), (a)(1), (b), 846; U.S.S.G. Table, Ch. 5, Pt. A; § 1B1.1 *et seq.*, 18 U.S.C.A.App.; 18 U.S.C.A. § 3147; U.S.S.G. Table, Ch.5, Pt. A, 18 U.S.C.A.App.

6. Criminal Law 991(1.5)

Enhancement under statute requiring consecutive sentence if defendant commits offense while released applies to sentence for new, federal crime committed while on

release, not original crime for which defendant is on release. 18 U.S.C.A. § 3147.

7. Criminal Law 1177

Errors in computing sentence at mandatory minimum of 60 months were harmless in prosecution for possession and conspiracy to possess with intent to distribute more than 100 marijuana plants; trial judge's statements indicated that he wanted to give statutory minimum when he erroneously started at guideline's range of 51 months and erroneously added nine months for state-court conviction for assault following pretrial release. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a), (a)(1), (b), 406, 21 U.S.C.A. §§ 841(a), (a)(1), (b), 846; U.S.S.G. Table, Ch. 5, Pt. A; § 1B1.1 *et seq.*, 18 U.S.C.A.App.; 18 U.S.C.A. § 3147; U.S.S.G. Table, Ch.5, Pt. A, 18 U.S.C.A.App.

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Diane D. Kristein, Asst. U.S. Atty., Ronald F. Ederer, U.S. Atty., San Antonio, Tex., for plaintiff-appellee cross-appellant.

Appeal from the United States District Court for the Western District of Texas.

Before POLITZ, Chief Judge, KING and JOHNSON, Circuit Judges.

KING, Circuit Judge:

Our original opinion in this appeal, reported at 950 F.2d 961, is withdrawn in its entirety, and the following is substituted therefor:

In the central issue in this appeal, Charles D. Pace invites us to hold that which the Supreme Court has rejected

in a factually indistinguishable case--that a barn physically separate from a home enjoys Fourth Amendment protection because it is within the curtilage of the home, and that the area surrounding barn is protected as a "business curtilage." Because we do not believe that the Supreme Court would treat this case any differently than it did *United States v. Dunn*, 480 U.S. 294, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987), we decline Pace's invitation. We find that the search of a barn which ultimately led to Pace's conviction for conspiracy to possess, and possession of marijuana with intent to distribute, was constitutional, and therefore affirm his conviction. We also find that, although the district court improperly calculated Pace's sentence, Pace received the statutory minimum sentence required for a violation of 21 U.S.C. § 841(a). Because the district judge evinced an intention to give Pace the statutory minimum, we need not remand for resentencing. We therefore affirm Pace's sentence.

I.

In October, 1988, law enforcement officials in Travis County, Texas received information that marijuana was being grown in large quantities in a barn located on a 43-acre tract at the end of Lambert Road in Travis County. The barn was owned by Robert and Ouida Pace, the parents of appellant Charles Pace. In May 1989, a different informant contacted officials and told them that a large-scale marijuana operation was being conducted in the barn. Periodic surveillance was established on the barn and the property, and police observed appellant Pace, as well as John K. Treanor and John D. O'Brien, on the property.

On June 12, 1989, two officers entered the property and, looking through a hole in the barn, observed marijuana plants growing inside. On the basis of this information, a search warrant was issued for the barn. On June 15, agents of a joint task force composed of DEA agents and the

Organized Crime Unit of the Austin Police Department executed the warrant. The officers seized 796 growing marijuana plants and a prescription bottle in Pace's name with marijuana seeds inside, and arrested Pace, O'Brien and Treanor. Searches of the defendants' persons yielded keys to the padlock securing the entrance gate to the property and a key to a safe deposit box at a bank in Austin. On the basis of the information obtained from the search of the barn and the arrests, warrants were issued for the residence of Pace, the residence O'Brien shared with Treanor and the safe deposit box. At the O'Brien and Treanor residence officers seized documents, photographs, ledgers, catalogs, accounts, receipts, magazines, a small amount of marijuana and $5,665 in cash; at the Pace residence they seized a triple beam balance scale, a small quantity of marijuana and various business and phone records; and from the safe deposit box they seized a key to the gate of the property where the barn was located.

All three defendants were indicted for conspiracy to possess with intent to distribute more than 100 marijuana plants in violation of 21 U.S.C. §§ 841(a)(1) and 846, and knowingly possessing more than 100 marijuana plants with intent to distribute in violation of 21 U.S.C. § 841(a)(1).[1] Each filed a motion to suppress the evidence seized from the barn on June 15, arguing that the officers' observations of June 12, which formed the basis for the affidavit in support of the search warrant, resulted from an unconstitutional search of the barn. They further argued that the warrants for the searches of their homes and the safe deposit box were tainted by the unconstitutional search of the barn and that the evidence seized at those locations constituted "fruit of the poisonous tree."

1Although all three defendants were charged jointly, we treat their appeals in separate opinions. *See United States v. Treanor*, 950 F.2d 972 (5th Cir. 1991); *United States v. O'Brien*, 950 F.2d 969 (5th Cir. 1991).

After holding a hearing on the suppression motion, the district court made detailed findings of fact concerning the barn, the surrounding property, and the June 12 search. At the time of the search, the property was being used in part for the purpose of farming and ranching. The entrance to the property is secured by a closed gate with a lock and chain and a "Beware of Dog" sign. The property is surrounded by a fence, and there are numerous interior fences. The fences are constructed of "hog wire" topped with several strands of barbed wire. The fences are approximately four feet high and are designed to block the passage of objects larger than four to six inches in diameter.

The property is improved with a small wood frame house and storage shed located within 100 feet of the front gate. Behind a garage, approximately 50-60 feet from the house, is the barn and stock pen. The barn is separated from the rest of the house by an interior fence. The barn, a commercial structure used for the business of farming and ranching, is constructed primarily of corrugated steel panels and is completely enclosed. It has no windows, and the only access is through two locked doors. Police helicopter surveillance of the property revealed that the barn was covered with translucent corrugated sheeting of the type used in greenhouses, but was not so transparent that the police could see through it. The interior of the barn was not visible from outside the property.

On June 12, two officers entered the property, one by squeezing through a gap between the main gate and a fence post and the other by climbing over the gate. After knocking on the door of the house and looking through a window, the officers determined that the house was vacant. They crossed at least two more gates and went to the back side of the barn, where they found a small opening. The officers could not see inside the barn from any distance, but had to press their faces close to the opening to see inside. Their observation of marijuana plants in the barn led them to apply for a search

warrant, which they executed on June 15.

On the basis of these facts, the district court denied the suppression motion. The court first found that, because the barn was in an open field outside the curtilage of the home, the defendants had no reasonable expectation of privacy which would require the application of Fourth Amendment principles. The court determined that the barn was outside the curtilage by applying the four-part analysis of *United States v. Dunn*, 480 U.S. 294, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987), a factually similar case in which DEA agents stood outside a barn and observed drug operations within.[2] The court also rejected the argument that, even if the barn was not within the curtilage of the home, the area surrounding it was protected as the curtilage of a commercial structure. The court noted that the Supreme Court's assertion in *Dunn* that the officers were standing in an open field when they observed the drug operation inside the barn amounted to rejection of the notion of a business curtilage surrounding a barn. The court denied the motion to suppress evidence seized from the Lambert Road barn, and, because the evidence seized from the barn furnished probable cause to search the residences and the safe deposit box, denied the

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2*Dunn* requires, for the purpose of determining whether a particular search took place within the curtilage, an analysis of (1) the proximity of the area claimed to be curtilage to the home; (2) whether the area is included within an enclosure surrounding the home; (3) the nature of the uses to which the area is put; and (4) the steps taken by the resident to protect the area from observation by people passing by. *Id*, at 294, 107 S.Ct. at 1134. The district court found that the barn was 52 feet from the home, eight feet less than the barn in *Dunn*; that the barn was separated from the house by a fence, as in *Dunn*; and that the officers had evidence that the barn was not being used in connection with "the intimacies of the home." It is not entirely clear from the court's opinion whether it thought the fourth factor supported the constitutionality of the search.

motion to suppress the fruits of those three searches.

Pace proceeded to trial and was convicted by a jury on both counts. The district judge sentenced Pace to concurrent terms of imprisonment of 51 months for the drug convictions. He added to this a consecutive prison term of nine months, pursuant to 18 U.S.C. § 3147, because following his arrest and pretrial release Pace was convicted of misdemeanor assault in state court. Pace also received a five year period of supervised release, a fine of $10,000, and a $100 special assessment. Pace appeals the denial of his suppression motion, and the government appeals the sentence.

II.

A. *The Search of the Barn*

[1] Pace first argues that the warrantless search of the barn was unconstitutional because it took place within the curtilage of the home. We find this argument foreclosed by the Supreme Court's decision in *United States v. Dunn*, 480 U.S. 294, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987), a case whose facts so closely resemble the facts in this case that we recount them in some detail. In *Dunn*, DEA agents established surveillance,[3] including the taking of aerial photographs, of a large tract of rural property on which illegal drug operations were suspected. The property was completely encircled by a perimeter fence, and there were several interior fences constructed mainly of posts and multiple strands of barbed wire. A residence and a small greenhouse were encircled by one interior fence, and there were two barns located approximately 50 yards from this fence. The front of the larger of the two barns was encircled

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3The agents originally pinpointed the property in *Dunn* by means of electronic "beepers" which transmitted signals from items the defendants had purchased. 480 U.S. at 296-97, 107 S.Ct. at 1137.

by a wooden fence, and locked waist-high gates barred entry into the barn. Netting material stretched from the ceiling to the top of the wooden gates of this barn. 480 U.S. at 297, 107 S.Ct. at 1137.

Two law enforcement officials made a warrantless entry by crossing the perimeter fence and one interior fence. Standing midway between the residence and the barn, one official smelled what he thought was a chemical involved in the manufacture of phenylacetone coming from the direction of the barns. The officers crossed a barbed wire fence and looked into the smaller of the barns, where they found only empty boxes. They then crossed another barbed wire fence and the wooden fence encircling the front of the larger barn, walked to the locked gates, and viewed the interior of the barn by shining a flashlight through the netting. The officers did not enter the barn, but obtained a warrant authorizing a search of the ranch. 480 U.S. at 297-98, 107 S.Ct. at 1137-38.

The primary question before the Court was whether the barn was within the protected curtilage of the house. The Court began by referring to its recent decision in *Oliver v. United States*, 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984), in which it had reaffirmed a distinction for Fourth Amendment purposes between "open fields" and the curtilage of the home. Open fields are protected neither under the text of the Fourth Amendment[4] nor under the conception of the Amendment in *Katz v. United States*, 389

4The Fourth Amendment "indicates with some precision the places and things encompassed by its protections... '[T]he special protection accorded by the Fourth Amendment to the people in their "persons, houses, papers, and effects," is not extended to the open fields. The distinction between the latter and the house is as old as the common law.'" *Oliver*, 466 U.S. at 176, 104 S.Ct. at 1740 (quoting *Hester v. United States*, 265 U.S. 57, 59, 44 S.Ct. 445, 446, 68 L.Ed. 898 (1924)).

U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), as protecting those areas in which individuals have a "reasonable expectation of privacy." *Oliver*, 466 U.S. at 176-79, 104 S.Ct. at 1740-42. The curtilage of the home, on the other hand, was distinguished from open fields in the common law, a distinction the Court in *Oliver* took to mean that "only the curtilage, not the neighboring open fields, warrants the Fourth Amendment protections that attach to the home." *Id.* at 180, 104 S.Ct. at 1742.

The extent of the curtilage to which Fourth Amendment protection attaches is not unlimited. In *Dunn*, the Court undertook to define with more precision than it had previously the boundaries of this space. The inquiry is guided by "factors that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself," 480 U.S. at 300, 107 S.Ct. at 1139, with the central consideration the question whether "the area harbors the 'intimate activity associated with the "sanctity of a man's home and privacies of life."'" *id.* (quoting *Oliver*, 466 U.S. at 180, 104 S.Ct. at 1742 (quoting *Boyd v. United States*, 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746 (1886))). The Court identified four factors in particular that guide the curtilage inquiry,[5] taking care to point out that these are not to be applied mechanically but are useful to the extent they bear on the ultimate question whether the area "is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." *Id.* 480 U.S. at 301, 107 S.Ct. at 1140.

Applying the factors to the facts in *Dunn* itself, the Court found that the barn lay outside the protected curtilage in open fields. First, the barn was 50 yards from the fence surrounding the house and 60 yards from the house. This substantial distance alone 'support[ed] no inference that the

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5*See supra* note 2.

barn should be treated as an adjunct of the house." *Id.* at 302, 107 S.Ct. at 1140. Second, the barn did not lie within the fence that surrounded the house. The fence surrounding the house was considered significant as such fences generally "serve[] to demark a specific area of land immediately adjacent to the house that is readily identifiable as part and parcel of the house." *Id.* Third, law enforcement officials had objective data that the barn was being used for activities other than those associated with the intimacies of the home. *Id.* Fourth, the defendants did little to prevent someone standing in the open fields from viewing the interior of the barn; the fence surrounding the barn did not appear to serve this purpose. *Id.* at 302-03, 107 S.Ct. at 1140.

As the district court held, analysis of these factors in the instant case yields the same result as in *Dunn*. Apart from the need for the officers in this case to press their faces up to the barn, the factual similarity to *Dunn* is striking. The barn was located a significant distance from the house; it was separated from the house by an interior fence; earlier surveillance, including aerial photographs indicated that it was not being used for activities associated with the intimacies of home life;[6] and it was readily visible from the surrounding area. Pace attempts to distinguish *Dunn* by pointing out that the officers in this case could not see into the barn except by putting their faces up to the siding. He argues that this is somehow different than standing outside a barn and shining a flashlight on a netting. However, the holding of *Dunn* was that once the officers were standing in open fields outside the protected curtilage of the home, they were privileged to view the inside of the barn. The officers

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6Aerial photography from an aircraft legitimately in the airspace over private property was held not to violate the Fourth Amendment in *California v. Ciraolo*, 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986).

in this case were likewise privileged[7] to stand in the open field, and the distance between their bodies and the structure into which they peered is of no consequence. To hold otherwise would require us to draw a specious distinction between those open field searches in which officers physically come up against a structure and those in which they are able to see inside even while standing back from the structure. The officers in this case did not physically tamper with or enter the barn in order to view its contents, but merely stood outside in the open field and looked in.[8] Thus, the search did not violate the Fourth Amendment's proscription of searches within the curtilage of the home.

[2] Relying on *Dow Chemical v. United States*, 476 U.S. 227, 106 S.Ct. 1819, 90 L.Ed.2d 226 (1986), Pace presents as an alternative ground for reversal the notion that the area surrounding the barn enjoyed Fourth Amendment protection as a "business curtilage." He argues that the Fourth Amendment accords the barn independent protection as a commercial establishment, and that the surrounding area is protected under a theory analogous to the home curtilage theory. This argument too is foreclosed by the decision in *Dunn*.

In *Dow Chemical*, the Court reaffirmed that there is an expectation of privacy in commercial structures which society is prepared to accept as reasonable, thus bringing the interiors of such structures within the protections of the Fourth Amendment. 476 U.S. at 236, 106 S.Ct. at 1825; *see also See v. City of Seattle*, 387 U.S. 541, 87 S.Ct. 1737,

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7At least for Fourth Amendment purposes; although they may have been trespassing under state law, this fact is of no consequence to Fourth Amendment analysis. *Oliver*, 466 U.S. at 183-84, 104 S.Ct. at 1744.

8The officers' method of observing the contents of the barn in this case arguably was less intrusive than in *Dunn*, as they merely looked into the barn with the naked eye. In *Dunn*, the officers used a flashlight as an aid.

18 L.Ed.2d 943 (1967). The Court in *Dunn* did not dispute this precept when the defendant argued that he had a legitimate expectation of privacy in the barn which was violated when the officers peered inside. But the Court implicitly rejected the notion that the open fields surrounding a barn constitute a protected curtilage area into which law enforcement officials may not make a warrantless entry. The Court expressly referred to the fact that, when the officers viewed the inside of the barn, they were standing in open fields. Like the officers here, they stopped at the edge of the structure and merely looked inside without physically entering. We read this to mean that, given the physical layout of the property in *Dunn* and here, the open field surrounding a barn extends up to the edge of the structure itself, thus enabling officers to come as close to the structure as necessary to look inside without physically entering. Whatever *Dow Chemical* may have left open concerning the concept of a curtilage surrounding a business or commercial establishment, *Dunn* indicates that there is no business curtilage surrounding a barn lying within an open field. Thus, there was no constitutional violation when the officers crossed the fence and looked into the Pace barn. It follows that the warrant the officers obtained for the search of the barn was proper, as their observations furnished them with ample probable cause to search for the instrumentalities of a drug operation.

B. *The Search of the Residence*

[3] The information the police obtained from the search of the barn and the arrests of Pace, O'Brien and Treanor led them to file affidavits in support of warrants to search the suspects' residences. Pace contends that even if the information provided in these affidavits was true, the warrant for the search of his home was still unsupported by probable cause. He characterizes the officers' contention in the affidavit that drug dealers normally keep records at their homes as too conclusory to constitute probable cause.

Certainly, under *United States v. Freeman*, 685 F.2d 942 (5th Cir. 1982), the officers' possession of probable cause to believe that a crime had been committed at the time of the barn search and arrests did not automatically translate into probable cause to search the suspects' homes for additional evidence of the crime. *Freeman* requires that "facts must exist in the affidavit which establish a nexus between the house to be searched and the evidence sought." *Id.* at 949 (citations omitted). In *Freeman*, we found no probable cause to search the defendant Boese's residence for business records and other evidence of drug crimes where the police had observed Boese engaged in drug smuggling operations at other locations. Although police could connect Boese to the residence, nothing in the affidavit indicated that suspicious activity had taken place at the residence and nothing the police observed or knew about Boese's activities away from the residence established the home as a location at which illegal operations could have taken place. *Id.* at 950-51.

While the evidence provided in the affidavit in *Freeman* connecting the defendant's activities to his home was too tenuous to support a finding of probable cause to search for records and drug paraphernalia, that case does not, as Pace seems to suggest, categorically *prohibit* police officers from searching a suspect's home when the suspect has been arrested at another location. We concluded that there *was* probable cause to search for passports, personal identification papers and bank and safety deposit box records because these were "precisely the sorts of items which people tend to keep at home among their personal papers and effects." *Id.* at 949. Similarly, in *United States v. Maestas*, 546 F.2d 1177 (5th Cir. 1977), the fact that the defendant's accomplices sent material to the defendant at home as part of a counterfeiting scheme, combined with the reasonable inference that people keep mail at their home, supported probable cause to search the defendant's home for mail connected with the scheme. The affidavit must connect (in

a manner more convincing than in *Freeman*) the residence to be searched with the illegal activity, *Freeman* 685 F.2d at 949, but this nexus may be established "through normal inferences as to where the articles sought would be located." *Id.; see also United States v. Minis*, 666 F.2d 134, 139 (5th Cir.), *cert. denied*, 456 U.S. 946, 102 S.Ct. 2013, 72 L.Ed.2d 469 (1982).

[4] The circumstances surrounding the search of Pace's residence are identical in all important respects to the search we upheld in *United States v. Raborn*, 872 F.2d 589 (5th Cir. 1989). There, police executed a warrant at a rural farmhouse, where they found equipment and chemicals associated with a drug manufacturing operation. they arrested the defendant Gentry at the time of the search, and thereafter obtained a warrant to search Gentry's home. Because the officers personally observed the drug operation but did not find on the premises the kind of business records one would expect to find in connection with a drug manufacturing operation, we held that the affidavit in support of the warrant passed muster under *Freeman*. 872 F.2d at 596. The expectation of finding evidence of the crime at the suspect's home, *given that such evidence was not found at the scene of the illegal activity*, was a reasonable inference which supported the magistrate's determination of probable cause to search the residence. *Id.* Likewise, in this case, the officers executed a warrant at the barn and observed a drug operation in progress, but did not find the records one would normally associate with the business aspect of such an operation. The DEA agent who applied for the warrant described what he saw at the barn and then indicated in his affidavit, *inter alia*, that individuals who cultivate marijuana routinely conceal contraband, proceeds of drug sales and records of drug transactions in their homes in order to prevent law enforcement officials from discovering them. Probable cause involves a practical, commonsense determination by a neutral judicial officer whether the

information provided represents a basis for believing crime has been committed. *See Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983); *United States v. May*, 819 F.2d 531 (5th Cir. 1987). The affidavit described a sufficient connection between the illegal activity at the barn and the expectation of what would be found at Pace's residence to give rise to probable cause to search Pace's home. While the notion that "few places are more convenient that one's residence for use in planning criminal activities and hiding fruits of a crime," *United States v. Green*, 634 F.2d 222, 226 (5th Cir. 1981), does not provide carte blanche for searching a home when one is suspected of illegal activity, concealment of the business records of a drug operation at home certainly is a reasonable inference when a search of the situs of the operation yields no records. Accordingly, the district court correctly denied the motion to suppress evidence seized at Pace's home.[9]

III.

[5] We turn next to the government's appeal of Pace's sentence. Pace was convicted of possession with intent to distribute more than 100 marijuana plants and conspiracy to possess with intent to distribute more than 100 marijuana plants, in violation of 21 U.S.C. §§ 841(a)(1) and 846. These crimes are punishable under 21 U.S.C. § 841(b), which provides that in the case of a violation of § 841(a) involving more than 100 marijuana plants, the sentence shall be "a term of imprisonment which may not be less than 5 years and not more than 40 years."

In the presentence report, the probation officer noted the statutory minimum but computed Pace's Sentencing

---

9Our holding disposes of Pace's contention that the statements he made after the search of the barn and his arrest were inadmissible at trial.

Guideline range at 51 to 63 months imprisonment.[10] The district court sentenced Pace to 51 months imprisonment on each count to run concurrently, nine months less than the statutory minimum, and then added nine months pursuant to 18 U.S.C. §3147 because Pace was found guilty of assault in state court following pretrial release. In response to the government's request for an explanation at the sentencing hearing of why he was going below the statutory minimum, the judge explained that "I was intentionally going below that in this case only because of Title 18, United States Code, Section 3147, through which I brought the sentence up to a total equal to the statutory minimum."

This method of computing the sentence was incorrect. First, the district judge should have started with the statutory minimum sentence of 60 months. We have repeatedly held that the Guidelines do not supplant the minimum sentences provided for in various criminal statutes. *United States v. Garcia-Pillado*, 898 F.2d 36, 39 (5th Cir. 1990); *United States v. Stewart*, 879 F.2d 1268, 1272 (5th Cir.), *cert. denied*, 493 U.S. 899, 110 S.Ct. 256, 107 L.Ed.2d 205 (1989); *United States v. Roberson*, 872 F.2d 597, 606 & n.7 (5th Cir.), *cert. denied*, 493 U.S. 861, 110 S.Ct. 175, 107 L.Ed.2d 131 (1989).[11] As we stated in *Stewart*, "[t]here is nothing in the language of the guidelines to imply a repeal of other sentencing statutes." 879 F.2d at 1272. Indeed, § 5G1.1(b) requires a district court to apply the statutory minimum in lieu of the sentence calculated under the

---

10Based on the amount of marijuana involved, the probation officer set the base offense level at 22 and added two points for obstruction of justice, bringing the total offense level to 24. Pace had a criminal history score of zero, resulting in a sentencing range of 51 to 63 months imprisonment. *See U.S.S.G.* Sentencing Table.

11All circuits which have reached the issue are in accord with this basic principle. *See United States v. Rodriguez*, 938 F.2d 319, 320 (1st Cir. 1991)(collecting cases).

Guidelines. Thus, the court was obligated to sentence Pace at least to 60 months imprisonment.

[6] Second, the judge should not have enhanced Pace's sentence under 18 U.S.C. § 3147. that section, as amended, provides:

> A person convicted of an offense committed while released under this chapter shall be sentenced, in addition to the sentence prescribed for the offense to --
>
> (1) a term of imprisonment of not more than ten years if the offense is a felony; or
>
> (2) a term of imprisonment of not more than one year if the offense is a misdemeanor.
>
> A term of imprisonment imposed under this section shall be consecutive to any other sentence of imprisonment.

This statute provides for an enhanced sentence for a person who commits a *federal* crime while on release, and the enhancement applies to the sentence for the new crime committed while on release, not the original crime for which the defendant is on release.[12]

[7] Despite these two errors, we see no reason to disturb Pace's sentence. The end result was a sentence of 60 months, the mandatory minimum for Pace's offense. The judge's statements about why he was going below the minimum and then adding nine months for the enhancement indicate that he wanted to give Pace the statutory minimum.

12We overlooked this in our original opinion, holding that the nine months the judge gave Pace for the state court misdemeanor had to be added to the statutory minimum for the federal drug offense. On our own motion, we asked the parties to file letter briefs addressing the applicability of 18 U.S.C. § 3147 to state offenses committed while on release for a federal offense. Both parties agree that § 3147 has no applicability in these circumstances.

Were we to remand, Pace would be subject only to the possibility of receiving three more months (63 months was the upper range of his Guideline sentence). In light of the judge's apparent intent to give Pace only the 60-month minimum, we consider the errors harmless and see no reason to disturb the sentence.[13]

IV.

For the foregoing reasons, we AFFIRM Pace's conviction and sentence.

13In its letter brief, the government suggests that we vacate and remand because the probation officer improperly placed Pace in criminal history category I. The government contends that, under U.S.S.G. § 4A1.1(b), the officer should have added two points to Pace's criminal history score for the state assault conviction, thus placing him in criminal history category II. With an adjusted offense level of 24 and a criminal history category of II, Pace's Guideline range would be 57 to 71 months imprisonment. The government implies that we should remand to enable the district judge to impose a sentence of at least 60 months but potentially reaching 71 months. As the government never contested the calculation of Pace's criminal history category in its brief on appeal, we do not consider it here.

APPENDIX F

U.S. COURT OF APPEALS
FILED
FEB 13 1992
GILBERT E. GANUCHEAU
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-8549

UNITED STATES OF AMERICA,
Plaintiff-Appellee
Cross-Appellant,

versus

JOHN D. O'BRIEN,
Defendant-Appellant
Cross-Appellee.

Appeals from the United States District Court for the Western District of Texas

---

ON PETITION FOR REHEARING
(FEBRUARY 13, 1992)

Before POLITZ, Chief Judge, KING and JOHNSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby *denied.*

ENTERED FOR THE COURT:

/s/ Carolyn Denise King
United States Circuit Judge

CLERK'S NOTE: REHG-4
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

APPENDIX G

FILED
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BY /S/
DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

UNITED STATES OF AMERICA
V.
JOHN DEREK O'BRIEN CASE NUMBER: A-89-CR-108(1)

USAO Number: 89-02351
(Name of Defendant) Dick DeGuerin
Defendant's Attorney

THE DEFENDANT:
☒ pleaded guilty to count(s) 1 and 2 of the indictment at rearraignment on May 23, 1990.
☐ was found guilty on count(s) _____ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21:841(a)(1), IN VIOLATION OF 21:846	CONTRARY TO CONSPIRACY TO POSSESS WITH INTENT TO DISTRIBUTE MARIJUANA	06/15/89	1
21:841(a)(1)	POSSESSION WITH INTENT TO DISTRIBUTE MARIJUANA	06/89	2

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.

☒ It is ordered that the defendant shall pay a special assessment of $ 100.00, for count(s) 1 and 2, which shall be due ☐ immediately ☐ as follows:

The special assessment shall be paid to the CLERK, U.S. DISTRICT COURT.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 449-90-3597
Defendant's Date of Birth: 06/19/50
Defendant's Mailing Address:
see below

SEPTEMBER 21, 1990
Date of Imposition of Sentence
/s/ James R. Nowlin
JAMES R. NOWLIN,
U.S. DISTRICT JUDGE
Name & Title of Judicial Officer

Defendant's Residence Address:
1721 Palma Plaza
Austin, Texas 78703

September 21, 1990
Date

Defendant:JOHN DEREK O'BRIEN Judgment-Page 2 of 5
Case Number: A-89-CR-108(1)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of TWELVE (12) MONTHS

Count 1 - 12 months
Count 2 - 12 months

IT IS FURTHER ORDERED that the period of imprisonment imposed on Count 2 shall run concurrently to the period of imprisonment imposed on Count 1.

The Court FURTHER ORDERS that the defendant remain on his present bond pending appeal. Should the District Court's decision be affirmed, the defendant shall voluntarily surrender to the designated institution upon notification by the U.S. Marshal Service or the U.S. Probation Office.

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States marshal.

☐ The defendant shall surrender to the United States marshal for this district.

a.m.
☐ at _____ p.m. on _____
☐ as notified by the United States marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,
☐ before 2 p.m. on _____
☐ as notified by the United States marshal.
☐ as notified by the probation office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

Defendant:JOHN DEREK O'BRIEN Judgment--Page 3 of 5
Case Number: A-89-CR-108(1)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

- ☒ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.
- ☒ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.
- ☒ The defendant shall not possess a firearm or destructive device.

The defendant shall refrain from the illegal use of controlled substances (as defined in Section 102 of the Controlled Substance Act), and shall submit to periodic drug testing.

The defendant shall pay the fine in equal monthly installments upon his release from confinement under the direction and supervision of the U. S. Probation Office.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and

shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm defendant's compliance with such notification requirement.

14) The defendant shall not use or possess methadone for treatment purposes or in any other manner, shape or form, without express authority of the court.

Defendant:JOHN DEREK O'BRIEN Judgment--Page 4 of 5
Case Number: A-89-CR-108(1)

FINE

The defendant shall pay a fine of $ 10,000 . The fine includes any costs of incarceration and/or supervision.

☒ This amount is the total of the fines imposed on individual counts, as follows:

Counts 1 and 2 of the indictment

☐ The court has determined that the defendant does not have the ability to pay interest. It is ordered that:
☐ The interest requirement is waived.
☐ The interest requirement is modified as follows:

This fine plus any interest required shall be paid:
☐ in full immediately.
☐ in full not later than _____.
☐ in equal monthly installments over a period of __ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.
☐ in installments according to the following schedule of payments:

The fine shall be paid to the CLERK, U.S. DISTRICT COURT, at the direction of the U.S. Probation Office.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

Defendant:JOHN DEREK O'BRIEN Judgment--Page 5 of 5
Case Number: A-89-CR-108(1)

STATEMENT OF REASONS

☐ The court adopts the factual findings and guideline application in the presentence report.

OR

☒ The court adopts the factual findings and guidelines application in the presentence report except (see attachment, if necessary): The Court awards a two (2) level decrease for acceptance of responsibility.

Guideline Range Determined by the Court:

Total Offense Level: 20
Criminal History Category: I
Imprisonment Range: 33 to 41 months
Supervised Release Range: 3 to 5 years.
Fine Range: $ 7,500 to $ 1,000,000

☐ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $ N/A

☐ Full restitution is not ordered for the following reason(s):

☐ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

☐ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

☐ upon motion of the government, as a result of defendant's substantial assistance.

☒ for the following reason(s): The Court finds various reasons to depart downward and will formulate in writing to include the defendant's testimony, letters of reference, etc.

APPENDIX H

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

UNITED STATES OF AMERICA	§	
	§	
VS.	§	CRIMINAL NO.
	§	A-89-CR-108
	§	
JOHN DEREK O'BRIEN	§	

NOTICE OF APPEAL

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW JOHN DEREK O'BRIEN, Defendant, by and through his attorney, Dick DeGuerin, and files this Notice of Appeal from the judgment of conviction entered by this Court on the 21st day of September, 1990.

Respectfully submitted,

DeGUERIN & DICKSON

/s/ Dick DeGuerin
Dick DeGuerin
1018 Preston, 7th Floor
Houston, Texas 77002
(713) 223-5959
Federal Admissions No. 6204

CERTIFICATE OF SERVICE

I certify that a true and correct copy of **Notice of Appeal** has been served on the following counsel by mailing same to them on the 24th day of September, 1990:

Mr. Gerald Carruth
Asst. U.S. Attorney
650 First City Centre
816 Congress Avenue
Austin, Texas 78701

Mr. Steve Orr
Attorney for Co-Defendant Pace
Stewart Title Building
Suite 211
Austin, Texas 78701

Mr. Bill White
Attorney for Co-Defendant Treanor
1306 Nueces
Austin, Texas 78701

/s/ Dick DeGuerin
Dick Deguerin

APPENDIX I

FILED
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U.S. CLERK'S OFFICE
BY /S/
DEPUTY

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

UNITED STATES OF AMERICA	§	
	§	
VS.	§	CRIMINAL NO.
	§	A-89-CR-108(1)
	§	
JOHN DEREK O'BRIEN	§	

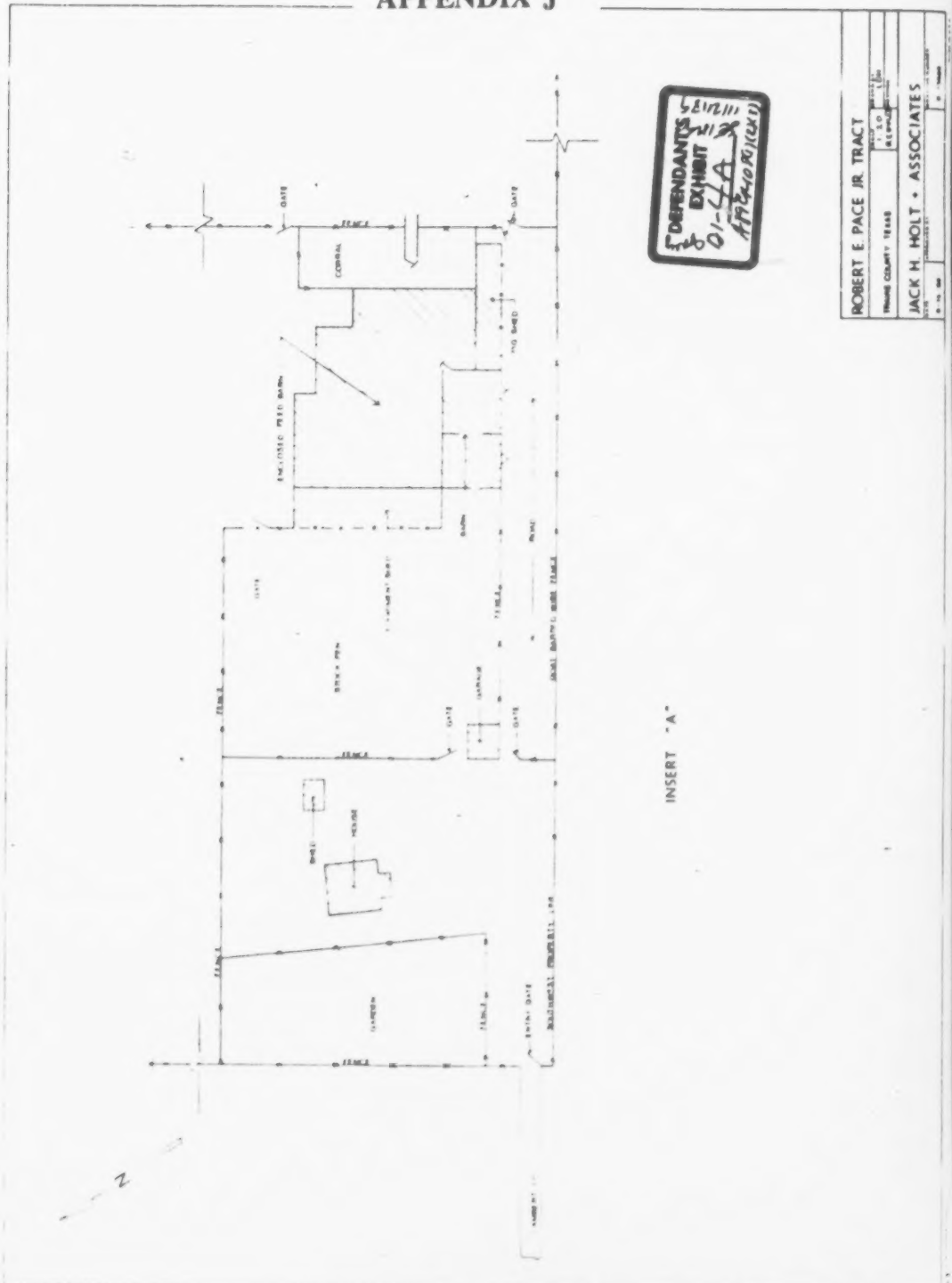
ORDER

UPON PRESENTATION of Defendant O'Brien's Amended Unopposed Motion for Stay of Resentencing Pending Application for Writ of Certiorari, the Court is of the opinion that the same should be and is hereby GRANTED.

SIGNED in Austin, Texas on the 9th day of March, 1992.

/s/ James R. Nowlin
PRESIDING JUDGE

APPENDIX J



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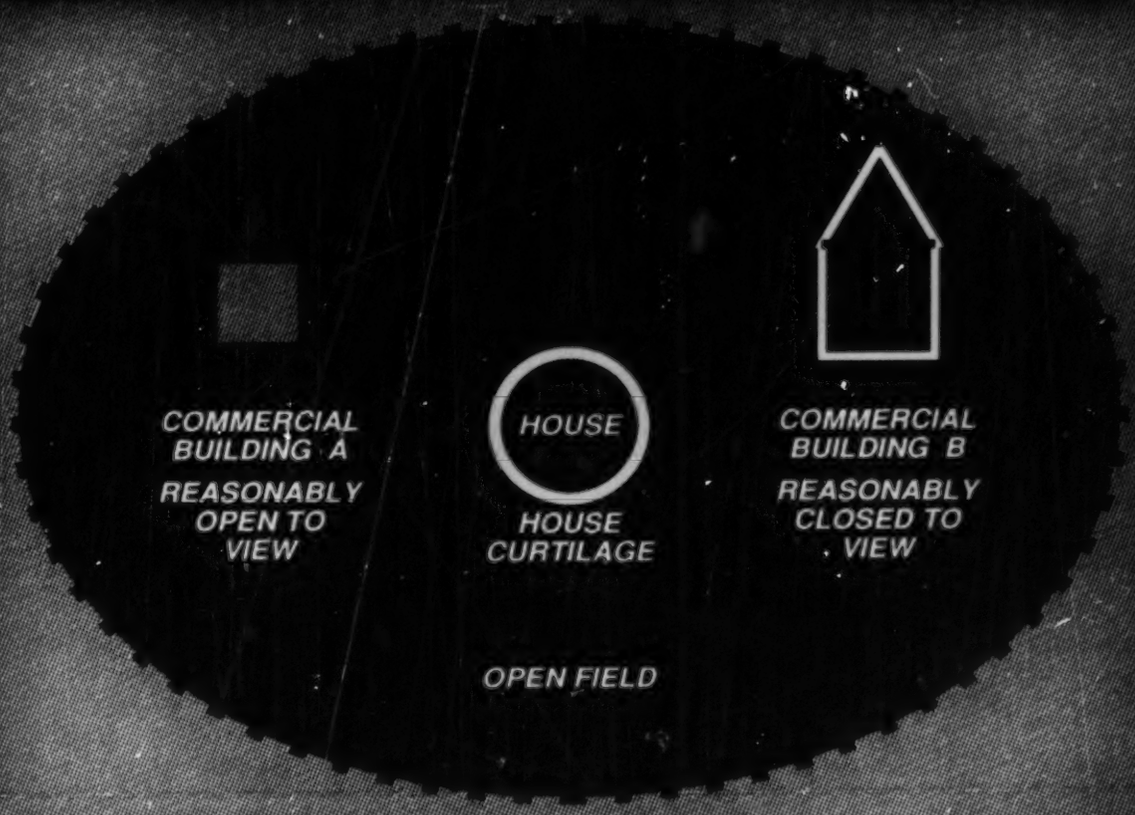
APPENDIX K

AREAS OF FOURTH AMENDMENT PROTECTION



SYMBOL	STRUCTURE OR AREA	4TH AMENDMENT PROTECTION
	HOUSE	YES
	HOUSE CURTILAGE	YES
	OPEN FIELD	NO
	COMMERCIAL BUILDING A	NO
	COMMERCIAL BUILDING B	YES

No. 91-1853

In the Supreme Court of the United States

OCTOBER TERM, 1992

JOHN D. O'BRIEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

RICHARD A. FRIEDMAN
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court erred in concluding that it did not constitute an illegal search for the police to look into a barn while standing in an "open field."

2. Whether the district court erred in considering petitioner's post-offense rehabilitation as a ground for a downward departure from petitioner's Guidelines sentencing range.

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United States v. *Reed*, 882 F.2d 147 (5th Cir. 1989)	5
United States v. *Sklar*, 920 F.2d 107 (1st Cir. 1990)	9, 10

Constitution, statutes and rules:

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1853

JOHN D. O'BRIEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 28a) is reported at 950 F.2d 969.

JURISDICTION

The judgment of the court of appeals (Pet. App. 28a) was entered on December 30, 1991. A petition for rehearing was denied on February 13, 1992. Pet. App. 54a. The petition for a writ of certiorari was filed on May 13, 1992. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

After entering a conditional guilty plea in the United States District Court for the Western District of Texas, petitioner was convicted of possession of marijuana with intent to distribute it and conspiracy to commit that offense, in violation of 21 U.S.C. 841(a)(1) and 846. He was sentenced to 12 months' imprisonment, to be followed by a five-year term of supervised release. The court also imposed a $10,000 fine. Pet. App. 29a-30a.

1. In October 1988, law enforcement officials in Travis County, Texas, received information that large quantities of marijuana were being grown in a barn located on a 43-acre tract of land in the county.[1] The barn was situated 156 feet (see Pet. App. 8a) from a house that was located on the property; both the house and the barn were surrounded by separate fences, as was the entire 43-acre property. The barn was owned by the parents of petitioner's co-defendant, Charles Pace. In May 1989, a different informant contacted officials and told them that a large-scale marijuana operation was being conducted in the barn. Periodic surveillance of the barn and the property was established, and the police observed petitioner, along with Charles Pace and a third co-defendant, John K. Treanor, on the property.

On June 12, 1989, two officers entered the property and looked through a hole in the barn from a vantage point outside it. They observed marijuana plants growing inside the barn. On the basis of that information, the police obtained and executed a search warrant for the barn. In the course of the search, the officers seized 796 growing marijuana plants and a prescription bottle in Pace's

[1] The facts relating to the Fourth Amendment issues in this case are stated in *United States* v. *Pace*, 955 F.2d 270 (5th Cir. 1992) (*reprinted at* Pet. App. 38a-39a), which was the appeal of one of petitioner's co-defendants.

name with marijuana seeds inside. The agents arrested petitioner, Pace, and Treanor. Searches of those individuals yielded keys to a padlock securing the entrance gate to the property and a key to a safe-deposit box at a nearby bank. Pursuant to a warrant, the agents searched a residence shared by petitioner and Treanor. There, they discovered documents, photographs, ledgers, catalogs, accounts, receipts, a small quantity of marijuana, and $5,665 in cash. A search of Pace's residence yielded a triple beam balance scale, a small quantity of marijuana, and various business and telephone records. The safe-deposit box contained a key to the gate of the property where the barn was located. Pet. App. 38a-39a.

2. a. Petitioner and his co-defendants moved to suppress the evidence discovered as the result of the search of the barn. They contended that the search warrant for the barn was invalid because the probable cause underlying the warrant application was based solely on information obtained when the officers peered into the barn from a hole in its side. The district court denied the motions. Applying the four-part analysis set forth in *United States* v. *Dunn*, 480 U.S. 294 (1987), the district court determined that the barn was located in an "open field" outside the curtilage of the home on the property, and that the defendants had no reasonable expectation of privacy in the area surrounding the barn. Pet. App. 1a-15a. Accordingly, the district court ruled that the officers did not violate the Fourth Amendment when they peered through an opening in the barn to observe marijuana growing inside.

b. At sentencing, the district court determined that petitioner's Sentencing Guidelines offense level was 22, based on the quantity of marijuana involved. The court then granted a two-level reduction for acceptance of responsibility. The total offense level of 20, combined with petitioner's Criminal History Category I, yielded a

Guidelines sentencing range of 33-41 months. The court then departed downward from the Guidelines range to impose a sentence of 12 months' imprisonment. Pet. App. 18a-21a, 30a. The court found that petitioner's acceptance of responsibility "is present to a degree substantially in excess of that which is ordinarily involved in similar crimes" and that petitioner had made "efforts at self-rehabilitation and restitution to the community." *Id.* at 19a.

3. The court of appeals affirmed the district court's denial of the suppression motion, but reversed its decision to depart downward from petitioner's Guidelines sentencing range. Pet. App. 30a, 42a-50a.

a. The court rejected petitioner's claim that he had a reasonable expectation that the interior of the barn would not be viewed by police officers because the barn was within the curtilage of the home. Pet. App. 42a-46a. The court relied on *Dunn*, which involved facts "so closely resembl[ing] the facts in this case" (*id.* at 42a) that the court of appeals characterized the similarity as "striking" (*id.* at 45a). The court held, as did this Court in *Dunn*, that the barn was not within the curtilage of the nearby residence, and it therefore did not implicate any interest recognized by the Fourth Amendment for the officers to stand outside the barn and peer into it. The court of appeals also rejected petitioner's argument that there was a "business curtilage" surrounding the barn that brought the area around the barn within the privacy interest attendant to commercial establishments. *Id.* at 46a-47a.

b. The government appealed the district court's determination to depart downward from the applicable Guidelines sentencing range. Agreeing that the district court had not identified an adequate ground to support a downward departure, the court of appeals reversed. The fact that petitioner had strong "community ties" was not

an appropriate factor, the court held, because that factor was adequately considered by the Sentencing Commission, which explicitly rejected it as a ground for departure. Sentencing Guidelines § 5H1.6. Pet. App. 32a. Following its earlier decision in *United States* v. *Reed*, 882 F.2d 147 (5th Cir. 1989), the court rejected as a basis for departure the fact that petitioner was a "worthwhile person," because to base a sentence on an individual's personal characteristics "partake[s] of the model of penology that Congress rejected in the Sentencing Reform Act." Pet. App. 33a. The court next held that petitioner's "remorse and acceptance of responsibility for the crime" were adequately taken into account by the Guidelines in providing for a reduction based on acceptance of responsibility, see Sentencing Guidelines § 3E1.1, which petitioner had received. Pet. App. 33a n.1. Finally, relying on *United States* v. *Lara-Velasquez*, 919 F.2d 946, 955 (5th Cir. 1990), the court concluded that "rehabilitative potential is not a valid basis for downward departure." Pet. App. 33a n.1.

ARGUMENT

1. Petitioner contends (Pet. 9-11) that he had a reasonable expectation of privacy in the area surrounding the barn and that the officers violated that expectation of privacy when they stood outside the barn and peered into it without first obtaining a search warrant. This Court previously rejected the same claim—on "striking[ly]" similar facts (Pet. App. 45a)—in *United States* v. *Dunn*, 480 U.S. 294 (1987).

In *Dunn*, DEA agents established surveillance of a large tract of rural property. The property was completely encircled by a perimeter fence, and there were several interior fences of barbed wire. A residence was encircled by another fence, and two barns were located approximately 50 yards from that fence. The front of the

larger of the two barns was encircled by a wooden fence, and locked, waist-high gates barred entry into the barn. Netting material stretched from the top of the wooden gates to the ceiling of the barn. Two law enforcement officials entered the property and approached the barn by crossing the perimeter fence, the barbed wire fences, and the wooden fence encircling the front of the larger barn. They then viewed the interior of the barn by shining a flashlight through the netting. Inside the barn, they saw what they believed to be a phenylacetone laboratory. The officers then obtained a warrant and entered and searched the barn. *Dunn*, 480 U.S. at 296-298.

In rejecting Dunn's Fourth Amendment challenge, this Court held that no search occurred when the officers peered into the barn without entering it. The crucial question was whether the area surrounding the barn (where the officers stood as they looked into it) was part of the curtilage of the home located on the property, or rather whether it was an "open field." The Court held that, if an "individual reasonably may expect that the area in question should be treated as the home itself," 480 U.S. at 300, because "the area harbors the intimate activity associated with the sanctity of a man's home and the privacies of life," *ibid.* (internal quotation marks omitted), the area is properly characterized as curtilage and is protected by the Fourth Amendment.[2]

[2] The *Dunn* Court identified four factors that guide the curtilage inquiry, taking care to point out that they are not to be applied mechanically but are useful to the extent they bear on the ultimate question whether the area "is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." 480 U.S. at 301. The four factors are: (1) the proximity of the area claimed to be curtilage to the home; (2) whether the area is included within an enclosure surrounding the home; (3) the nature of the uses to which the area

Petitioner does not claim that the courts below improperly applied *Dunn* in determining that the barn in this case was not within the curtilage of the home. Rather, petitioner urges (Pet. 9-10) that this case is entirely different from *Dunn*, because the barn at issue here was used as part of a commercial enterprise. Petitioner contends that because this Court has held that the Fourth Amendment applies to places of business, see *Oliver* v. *United States*, 466 U.S. 170 (1984); *Dow Chemical Co.* v. *United States*, 476 U.S. 227 (1986), business premises should have a curtilage of their own.

That claim is without merit. In *Dunn*, the defendant argued that the barn at issue was part of a commercial enterprise and was entitled to Fourth Amendment protection on that basis. See 480 U.S. at 303. This Court assumed that to be true, but nonetheless held that the police conduct did not amount to a Fourth Amendment search because the officers did not enter the barn. 480 U.S. at 303-305. As in *Dunn*, the fact that the barn in this case might be entitled to Fourth Amendment protection because it was used for business purposes has no bearing on whether it violated any legitimate expectation of privacy for the authorities to peer inside the barn without entering it.

In *Dow Chemical*, the government performed aerial surveillance of a secure 2,000-acre outdoor manufacturing facility in an effort to uncover illegal conduct. This Court held that the surveillance did not constitute a Fourth Amendment search because the government did not enter the property. 476 U.S. at 237. The Court recognized that a different issue would be posed if physical entry had occurred, because "[t]he businessman, like the occupant of a residence, has a constitutional right to go

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is put; and (4) the steps taken to protect the area from observation by people passing by. *Ibid.*

about his business free from unreasonable official entries upon his private commercial property." *Ibid.* This Court's decision in *Dow Chemical*, in combination with its rejection of petitioner's "business curtilage" claim in *Dunn*, leaves no room for petitioner to argue that the barn in this case had its own curtilage that the police could not enter without a warrant.

Finally, the factual distinctions petitioner perceives between this case and *Dunn* are inconsequential. Although petitioner is correct (Pet. 7 n.6) that the closed doors to the barn in *Dunn* did not completely bar an outside observer from seeing inside, the officers in that case needed to use a flashlight to peer through a netting in order to see inside. 480 U.S. at 298. In contrast, although the officers in this case looked through a hole in the barn rather than through the doorway, they were able to see inside with the naked eye. Thus, the barn in *Dunn* was not as open to view, and the one in this case was not as closed, as petitioner suggests. Petitioner also claims (Pet. 10) that the result in *Dunn* would have been different if there had been an affirmative finding in that case (as there was here) that the barn in question was used for commercial purposes. That contention is wrong, as the Court decided *Dunn* on the express assumption that the barn was a commercial structure. 480 U.S. at 303-304.

2. Petitioner's second claim (Pet. 11-13) is that the district court had authority under the Sentencing Guidelines to depart downward because of petitioner's post-offense rehabilitation. Petitioner alleges that the courts of appeals are in conflict on the question whether post-offense rehabilitation can be a valid ground for a downward departure under the Sentencing Guidelines.

a. The court of appeals correctly determined that petitioner's post-offense rehabilitation was not a valid ground for downward departure. A sentencing court

must impose a sentence within the applicable Guidelines range "unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." 18 U.S.C. 3553(b). As the court of appeals concluded, the Sentencing Guidelines already take account of self-rehabilitation through the acceptance of responsibility adjustment under Guidelines § 3E1.1. See Pet. App. 33a & n.1.

b. Contrary to petitioner's contention, there is no conflict among the circuits requiring this Court's review. In *United States* v. *Sklar*, 920 F.2d 107 (1990), the First Circuit vacated a sentence that included a downward departure based on the defendant's post-arrest, presentencing drug rehabilitation. The court held that "the mere fact of demonstrated rehabilitation between the date of arrest and date of sentencing cannot form the basis for a downward departure." 920 F.2d at 116. In the court's view, the Sentencing Commission "factored presentence rehabilitation into a two level reduction in the offense level for acceptance of responsibility." 920 F.2d at 115-116 (citing Sentencing Guidelines § 3E1.1). Although the *Sklar* court left open the possibility that "a defendant's rehabilitation might, on rare occasion, serve as a basis for a downward departure" when it is present "to a degree not adequately taken into consideration by the acceptance of responsibility reduction," 920 F.2d at 116, the defendant's rehabilitation in that case fell far short of that standard. The court therefore concluded that "[t]he downward departure [could] not stand." 920 F.2d at 117.

In *United States* v. *Harrington*, 947 F.2d 956 (1991), the D.C. Circuit likewise vacated a sentence that included a downward departure based on post-arrest drug rehabilitation. The court adopted the reasoning of *Sklar*,

holding that post-arrest, presentencing drug rehabilitation is not a valid basis for a downward departure except, perhaps, in the "extraordinary" case where a defendant's rehabilitation is of a degree not adequately taken into account by the reduction available for acceptance of responsibility. 947 F.2d at 958-963.[3]

The holdings of *Sklar* and *Harrington* are consistent with the decision in this case. All three decisions concluded that the Sentencing Guidelines adequately take account of post-arrest rehabilitation in providing for an acceptance of responsibility reduction, and each decision rejected the proposition that a downward departure may be granted merely because the defendant has been rehabilitated. While the courts in *Sklar* and *Harrington* stated that a downward departure might be authorized in an "extraordinary" case, that suggestion was dictum; neither case found the defendant's rehabilitation to be extraordinary enough to merit a downward departure, even assuming one might sometimes be authorized. See *Sklar*, 920 F.2d at 116-117; *Harrington*, 947 F.2d at 963.

Nothing in the record in this case suggests that the First Circuit or the D.C. Circuit would find petitioner's post-offense rehabilitation to be so extraordinary as to merit a downward departure. The factors relied upon by petitioner (Pet. 12-13) do not indicate "extraordinary" rehabilitation. First, petitioner's abandonment of criminal activity and criminal associations following his arrest is not surprising, and is the least society should ex-

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[3] *United States* v. *Lopez*, 938 F.2d 1293 (D.C. Cir. 1991), which petitioner also alleges (Pet. 8-9) is in conflict with the decision below, does not deal with the issue of post-arrest rehabilitation. In that case, the D.C. Circuit affirmed the district court's refusal to depart downward on account of the defendant's age, finding that the case did not present any "extraordinary" circumstances indicating that the Sentencing Guidelines had not adequately taken that factor into account. 938 F.2d at 1296.

pect from a defendant. Nor does petitioner's initiation of therapy for being a child of an alcoholic parent bear on his rehabilitation for his drug trafficking crimes. Finally, the fact that petitioner used his musical talents for charitable purposes is commendable, but is unrelated to his drug trafficking crimes.

The remaining case cited by petitioner (Pet. 8) to support his claim of conflict, *United States* v. *Maddalena*, 893 F.2d 815 (6th Cir. 1989), is readily distinguishable from the present case. In that case, the Sixth Circuit held that the district court had discretion to consider whether the defendant's "efforts to stay away from drugs" warranted a downward departure. 893 F.2d at 817. Unlike petitioner, however, the defendant in *Maddalena* began his efforts at rehabilitation long before his arrest for the offense of conviction. 893 F.2d at 817 n.1. As the D.C. Circuit emphasized, because *Maddalena* did not concern post-arrest rehabilitative efforts, the decision "may stand for no more than a determination by the Sixth Circuit that a district court has discretion to consider mitigating circumstances in an individual defendant's background in deciding whether to impose a sentence outside the guideline range." *Harrington*, 947 F.2d at 961. Thus, even assuming that *Maddalena* was correctly decided, it is inapposite here.[4]

[4] On remand in *Maddalena*, the district court refused to depart downward, and the court of appeals refused to disturb the sentence. *United States* v. *Maddalena*, 931 F.2d 57 (6th Cir.) (Table), cert. denied, 112 S. Ct. 233 (1991).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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